THE TRUTH ABOUT DRUG COMPANY PROFITS • RFK'S STRANGE LURE

REASON

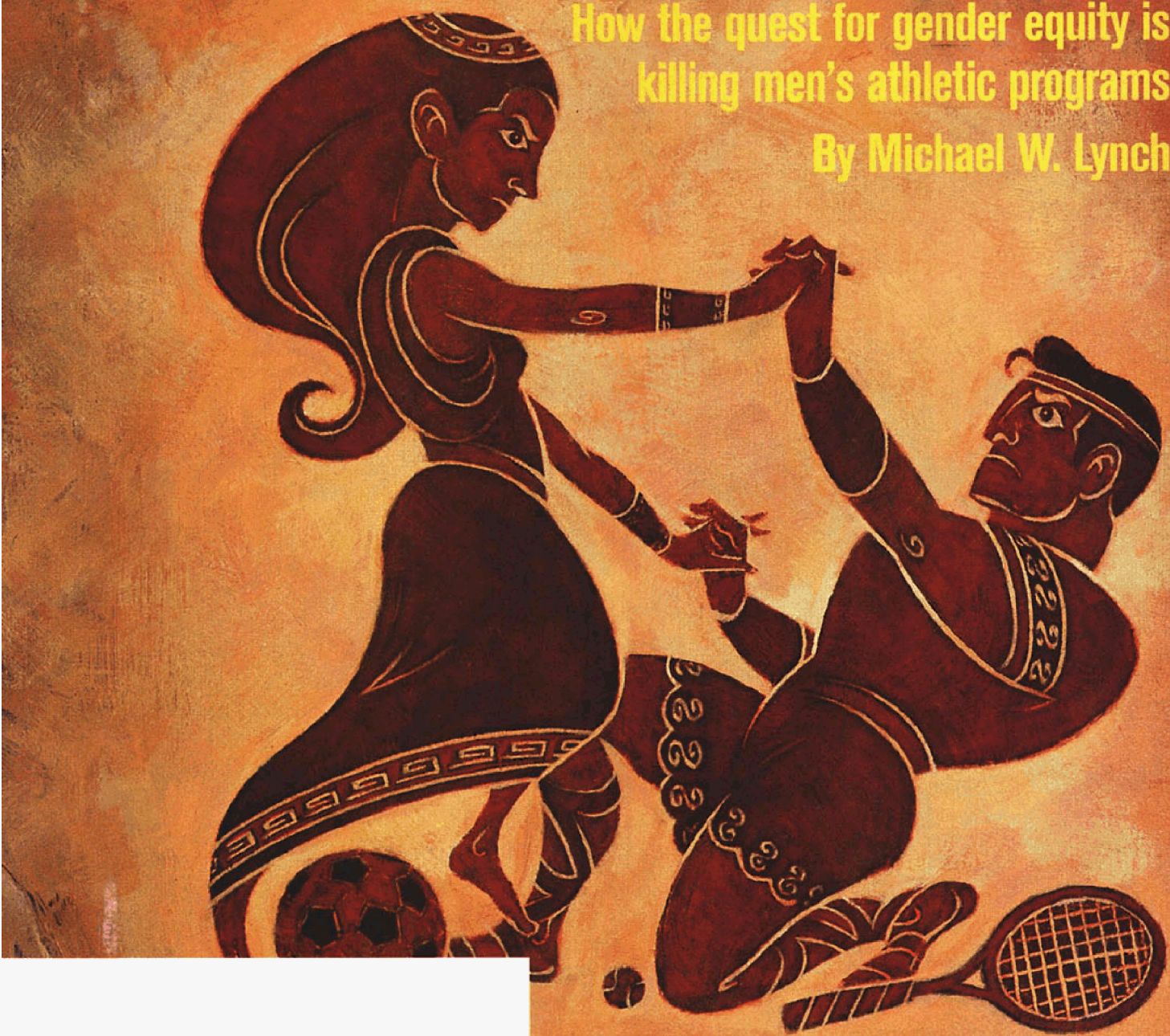
Free Minds and Free Markets

April 2001

TITLE IX'S PYRRHIC VICTORY

How the quest for gender equity is killing men's athletic programs

By Michael W. Lynch



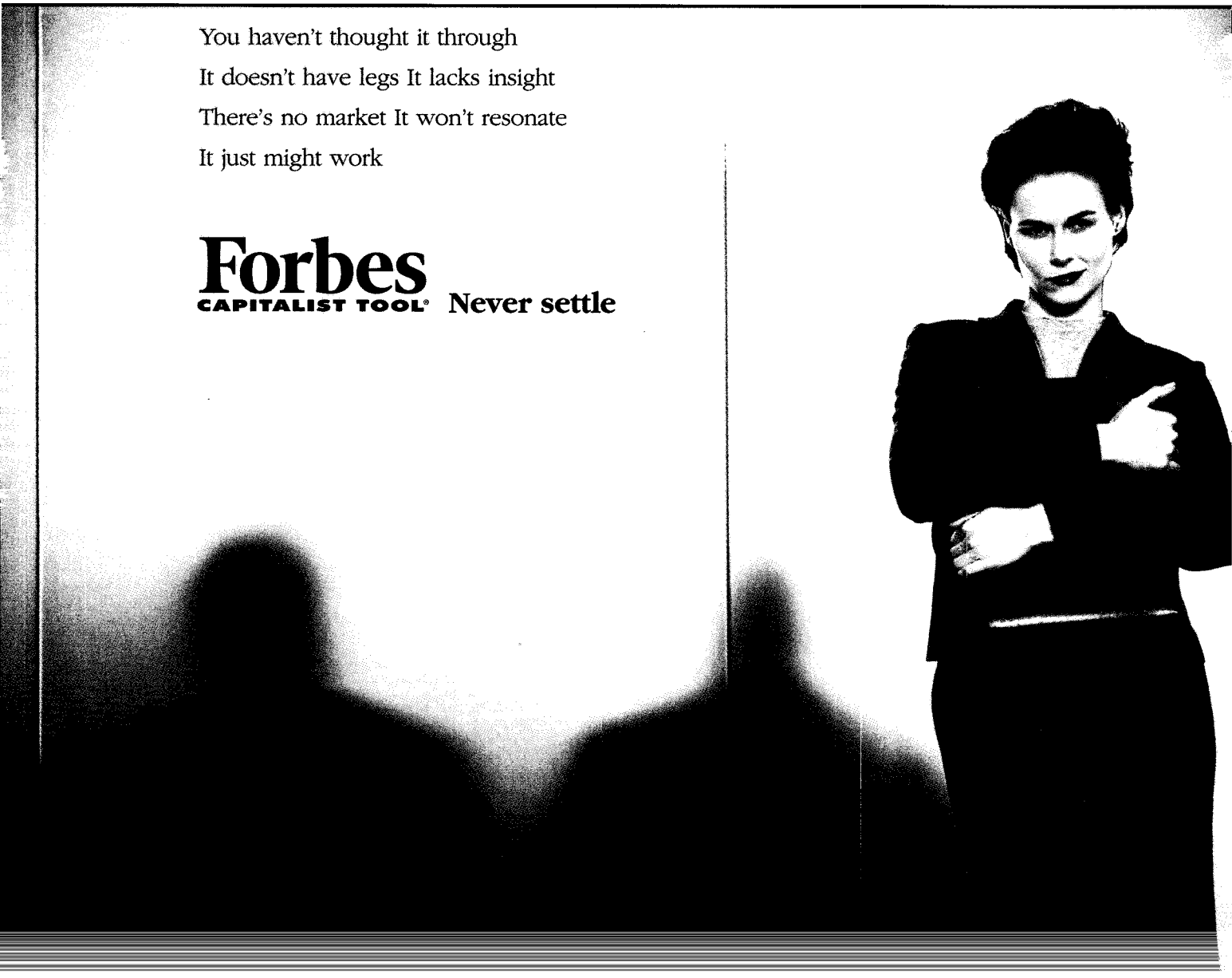
LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

www.reason.com

Your idea will never fly

You haven't thought it through
It doesn't have legs It lacks insight
There's no market It won't resonate
It just might work

Forbes
CAPITALIST TOOL® **Never settle**



LICENSED TO UNZ.ORG

REASON
Free Minds and Free Markets
April 2001/Vol. 32 No. 11

Features

28 Title IX's Pyrrhic Victory by Michael W. Lynch
How the quest for gender equity is killing men's athletic programs.

36 Sex, Economics, and Other Legal Matters: An Interview With Richard A. Posner by Steve Kurtz
The judge and scholar speaks out on the Clinton impeachment, the Microsoft case, and nude dancing.

44 Goddamn the Pusher Man by Ronald Bailey
Why does everybody seem to hate the pharmaceutical industry?

Editorial

5 Bush the Lesser by Nick Gillespie
Living through a minimalist presidency.

Columns

19 Capital Letters: Policy Days by Michael W. Lynch
In which our man in Washington hears retirement talk, takes in an intentional congressional comedy show, and enjoys a Texas breakfast.

23 Cathy Young: Monkeying Around with the Self
Why support for biotech shouldn't foreclose the debate over its moral issues.

27 Rant: In God We Trust by Charles Paul Freund
The right wants to do to faith-based charity what the left has done to culture.

Culture & Reviews

52 A Rendezvous with Density by Michael Valdez Moses
The FDR Memorial and the Clinton era.

56 Surfing Secrets by Jennifer DePalma
The multiple meanings of online privacy.
***The Hundredth Window: Protecting Your Privacy and Security in the Age of the Internet,** by Charles Jennings and Lori Fena*

58 Going *Bezirke* by John McClaughry
Where little platoons and little governments meet.
***Solving Problems Without Large Government: Devolution, Fairness, and Equality,** by George W. Liebmann*

60 San Francisco Bleat by Brian Doherty
Have the lights gone down forever in the City by the Bay?

61 Getting Right with Bobby by John J. Pitney Jr.
The strange lure of Robert F. Kennedy.
***Robert Kennedy: His Life,** by Evan Thomas*
***In Love with Night: The American Romance with Robert Kennedy,** by Ronald Steel*

Departments

8 Letters
Calling Dr. Strangelunch, God & the state, shootout over Arming America...

12 Citings
Silencing cell phones, fly the flag or else, hell's bells...

66 Artifact: Shear Anxiety
Haircut cops in Kabul.

Cover illustration: Darren Gygi

REASON (ISSN 0048-6906) is published monthly except combined August/September issue by the Reason Foundation, a nonprofit, tax-exempt organization, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034-6064. Periodicals postage paid at Los Angeles, CA, and additional mailing offices. Copyright© 2001 by Reason Foundation. All rights reserved. Reproduction or use, without permission, of editorial or graphic content is prohibited. Reason and Free Minds and Free Markets are registered trademarks owned by the Reason Foundation. **SUBSCRIPTIONS:** $19.98 per year. Outside U.S. add $10/year surface, $55/year airmail. Address subscription correspondence to Reason, P.O. Box 526, Mt. Morris, IL 61054, 815-734-1102. For address change (allow six weeks), provide old address and new address, including zip code. **UNSOLICITED MANUSCRIPTS** returned only if accompanied by SASE. **INDEXED** in Readers' Guide to Periodical Literature, InfoTrac, Political Science Abstracts, Book Review Index, and P.A.I.S. Bulletin. Available on microfilm from University Microfilms International, 300 North Zeeb Rd., Dept. P.R., Ann Arbor, MI 48106. **Printed in the United States. POSTMASTER:** Send address changes to Reason, P.O. Box 526, Mt. Morris, IL 61054. Publications Mail Sales Agreement No. 1476696.

The Sound of Great Ideas!®

The actual voices of . . . Karl Hess • Margaret Mead • John Hospers • Groucho Marx • Milton Friedman • Murray Rothbard • Friedrich Hayek • Ludwig von Mises • Nathaniel Branden • Barry Goldwater . . . and many others.

HEAR what these provocative thinkers have to say about individual freedom, the quality of life, the coercive nature of government, changes taking place in the world today, and what you can do to preserve *your* liberty.

There's a difference in **hearing** ideas rather than simply reading them. The author is able to provide unique emphases in ways impossible to accomplish in print. Pauses and tonal changes become meaning and create insights and increased understanding.

And audio cassettes provide a medium for learning experiences that can be shared, thus encouraging immediate discussion and interaction.

Today's audio cassettes capture the inflections, nuances, and flavor of the original speaker, and let you hear them over and over while driving, cooking, jogging, etc. Since some of these voices will never be heard again, here's your opportunity to savor the sound of great ideas that have shaped today's world, and to own these cassettes for your library.

From the more than 4,000 titles in the prestigious Audio-Forum Library, we have selected 26 extraordinary recordings. Imagine hearing these dynamic personalities in the intimacy of your own home! The regular price per cassette is $12.95. **But now for the special price of $9.95 you have the opportunity to listen whenever and wherever you choose. PLUS for every 3 cassettes you buy, we'll send you a cassette of your choice FREE!**

"The Sound of Great Ideas"
from **Audio-Forum,**
Room Q303,
96 Broad Street,
Guilford, CT 06437 • (203) 453-9794
Toll-free fax 1-888-453-4329

The 26 audio cassettes listed here were chosen by a panel of experts who were asked to select only tapes which would be timely and relevant. Each has passed the simple test of genuine interest: "Would you want to listen to this tape again?"

HEAR these famous speakers:

- **A Ludwig von Mises:** *Why Socialism Always Fails* (86 min.)
- **B Ludwig von Mises:** *Liberty and Property* (43 min.)
- **C Murray Rothbard & Joseph R. Peden:** *Libertarianism in American History (88 min.)*
- **D Milton Friedman:** *The Role of Government in Our Society* (58 min.)
- **E Nathaniel Branden:** *How to Communicate Political Ideas* (55 min.)
- **F Nathaniel Branden:** *Common Fallacies About Capitalism* (75 min.)
- **G Friedrich Hayek:** *U.S. Policy Guarantees Inflation* (38 min.)
- **H G. Wilson Knight:** *Shakespeare and the English Language* (30 min.)
- **I Ashley Montagu:** *The Nature of Human Nature* (48 min.)
- **J Murray Rothbard:** *How Government Destroys Our Money* (59 min.)
- **K Henry Hazlitt & Benjamin Rogge:** *Economics & Economic Freedom* (61 min.)
- **L Leonard Read & Dean Russell:** *Need for Free Markets & Less Government* (65 min.)
- **M Roger A. Freeman:** *The Effects of Federal Aid to Education* (43 min.)
- **N Noam Chomsky:** *Government in the Future* (57 min.)
- **O Karl Hess:** *The Future of Civilization* (63 min.)
- **P A. Szent-Gyorgyi:** *Some Misplaced Ideas about Democracy* (25 min.)
- **Q Walter Block:** *The Ethics of Libertarianism* (41 min.)
- **R Barry Goldwater:** *Conscience of a Conservative* (58 min.)
- **S John Hospers:** *The Politics of Liberty* (82 min.)
- **T Friedrich Hayek:** *The End of the U.S. Dollar Monopoly* (40 min.)
- **U H. Edward Rowe:** *Free Enterprise* (55 min.)
- **V Robert LeFevre:** *Coming Alive–Fundamentals of Libertarianism* (74 min.)
- **W Margaret Mead:** *How People Change* (25 min.)
- **X Groucho Marx:** *Fast Mind, Faster Mouth* (60 min.)
- **Y Edward De Bono:** *How to Change Ideas* (55 min.)
- **Z John Galbraith:** *Economics and the Public Purpose (*56 min.)

☐ **YES!** Please send me the following selections at $9.95 each plus $1.00 shipping charge for the first tape, and .50 for each additional tape. (For shipments to CT, please add 6% sales tax.)

I understand that for every 3 cassettes I order, I will get one FREE!

My selections: ◯◯◯ ◯◯◯

My free selection: ◯ ◯

NAME (Print)

ADDRESS, APT#

CITY, STATE, ZIP

Total amount of order: $_____
(Including tax and shipping)

☐ Check or money order enclosed
☐ VISA ☐ Discover Card
☐ Master Card ☐ American Express
☐ Diners Club ☐ Carte Blanche

Card #_____

Expiration Date: _____

Signature _____

Mail To: **AUDIO-FORUM®**
Room Q303, 96 Broad St.,
Guilford, CT 06437 (203) 453-9794
Toll-free fax 1-888-453-4329

Bush the Lesser

Living through a minimalist presidency

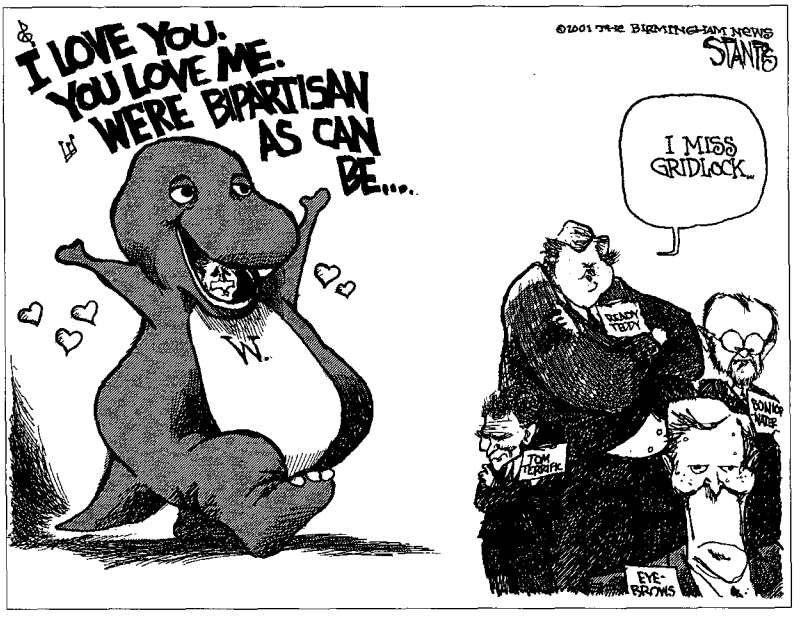
By Nick Gillespie

It's hardly surprising that conservatives have been exceptionally quick to claim that a dark cloud of national scandal and shame lifted the very moment George W. Bush stammered through the presidential oath without incident. As *The Weekly Standard*, doubtless speaking for many on the right, put it on their January 29 cover, "Our Long National Nightmare is Over." "Bill Clinton, the vulgar narcissist, is gone," announced an obviously relieved editor William Kristol. "George W. Bush's inaugural address showed a man plain-spoken, secure in his faith, and confident in his ability to lead the nation." (Just how sure of himself is Bush? According to another *Standard* bearer, Fred Barnes, Bush "brims with self-confidence" and doesn't take no for an answer. When he was told by a White House cook that he couldn't get a cheeseburger at his new home, reports Barnes, "Bush was insistent. 'Texas,' he said. 'Cheeseburger.' Next time he asks," enthuses Barnes, "you can bet he'll get his cheeseburger—pronto." Saddam Hussein, one assumes, has been put on notice.)

But a similar sense of relief regarding the president, if not necessarily the same sense of exuberance or fellow-feeling, extends well beyond the ranks of obvious Bush partisans. Many of the same reporters who questioned the smarts and bona fides of Candidate Bush are now fully taken with the man's "charm offensive," particularly his penchant for giving everyone he meets an odd, idiosyncratic nickname. (This is, it's worth pointing out, a quirk with real potential for causing trouble. It's one thing to call Rep. George Miller "Big George"; it's another to reportedly dub Sen. Ted Kennedy "Chappy.") One journalist, based in D.C. long enough to recall more than a few changes in administrations and no fan of either the Republicans or Bush, told me recently that he's simply enjoying the idea that an apparently relatively normal person is once again in the White House.

Much, if not all, of the generally positive mood toward Bush should be chalked up to the traditional presidential honeymoon, that vague period after inauguration when the press corps and even the loyal opposition seem to think the president is one swell guy, worthy of the office, and destined to do great (or at least not patently evil) things.

That said, Bush is clearly making the most of the moment, essentially setting the national agenda on his terms and generating mostly respectful media attention. This is most evident with regard to his $1.6 trillion tax cut and budget plan. Though it had been the centerpiece of his campaign, virtually all observers during and after the election assumed that it represented a large sum from which Bush and Congressional Republicans would immediately start bargaining down. Instead (and partly thanks to Alan Greenspan's intervention), it has become almost a minimum bid that even Democrats seem eager to gin up.



SCOTT STANTIS

Given his odd path to the White House, this is no small accomplishment. How has Bush—who was elected under the most dubious circumstances in American electoral history, who is acknowledged by his own supporters as one of the weakest thinkers to hold the presidency, and who made at least one Cabinet appointment (that of Attorney General John Ashcroft) seemingly designed mostly to provoke controversy—done it so far? Largely by playing the role of the anti-Clinton when it comes to personal style.

Bill Clinton was what could be called a "maximalist president." Early in his tenure, especially after his failed national health care initiative and the GOP's 1994 congressional ascendancy, Clinton's stature was diminished so greatly that the news weeklies started talking about "The Incredible Shrinking President" and "Does Bill Clinton Matter?" After a time, however, he emerged as ubiquitous in American public discourse, running the dreaded "permanent campaign" by daily announcing this or that piece of legislation (however trivial) or otherwise appearing in the news. (To be sure, for the final few years of his presidency, this had more to do with scandal than policy issues.) Though he ceased to propose any serious, major initiatives—by his own lights, the "era of big government was over"—Clinton was everywhere, sucking up whatever oxygen and attention was available.

Standing Athwart History 24/7.

www.nationalreview.com

AMERICA'S PREMIER WEBSITE OF CONSERVATIVE NEWS AND OPINION

NATIONAL REVIEW online

Indeed, he continued to do so even on the day of Bush's inauguration, making public his controversial pardons at midday and going so far as to review troops after he was technically relieved of his role as commander-in-chief. While the maximalist strategy helped Clinton stave off his enemies (even as his ubiquity made it easier for him to get into trouble), in the end The Man From Hope transmogrified into a version of The Man Who Came to Dinner, a latter-day Sheridan Whiteside, the comically omnipresent and annoying house guest created by George S. Kaufman and Moss Hart. By the end, Clinton became (and will remain) a chore to be around, even and perhaps especially for his supporters.

Bush, by contrast, is a minimalist in terms of personal style. He is relatively low-key, ostensibly humble and self-deprecating, even retiring ("naps" are in, say D.C. trend spotters); he was surprisingly—perhaps even disturbingly—invisible during the transition period, and his inauguration was, relatively speaking, an anti-spectacle. This tendency is nothing new. I lived in Texas for two years while Bush was governor and cannot remember ever seeing him on TV or hearing his voice during that time.

Part of this personal style is no doubt strategic: There seems to be a palpable fear among Bush's handlers whenever he opens his mouth in a public setting, and it seems highly unlikely we will be seeing him in unscripted situations very often over the next four years. While the president may seem comfortable with his malapropisms and strange locutions, they nonetheless put his backers on edge.

His style is one of the reasons (though not the only one) why many in D.C. talk about the adults coming back to town after a hiatus during which the kids had been running the place. It is also one of the reasons why he has, in surprisingly short order, shaken off questions about his electoral legitimacy. Irrespective of the substance of his policies, Bush's minimalist approach seems perfectly suited to a post-Clinton political age. It helps calm a public whose nerves are frazzled.

There is an understandable, though mistaken, tendency to link personal style with substance: A minimalist style must suggest minimalist policies. But such linkage is not a given. Indeed, while Bush may be given to minimal proceedings, at least two of his early policy proposals—giving federal dollars to charities, and his education plan, which will increase federal spending and control over K–12 education—represent anything but the shrinking of the scope of federal government and its power.

Bush was surprisingly—even disturbingly—invisible during the transition period, and his inauguration was, relatively speaking, an anti-spectacle.

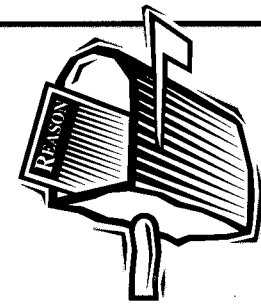
It remains an open question what sort of president Bush will make and what sort of government will emerge from his interaction with Congress. Many observers (more precisely, many observers on the right and in the center) are saying that we're in for a thankfully bland four years, one in which the president is something other than the center of all conversations, whether they are about politics or scandal. That may be. But it remains to be seen whether the gap between Bush's personal style and political substance grows or diminishes over time.

Nick Gillespie (gillespie@reason.com) is REASON*'s editor-in-chief.*

Attention College Students

REASON is accepting applications for the 2001 Burton C. Gray Memorial Internship. The intern works at least 10 weeks in our Los Angeles office and receives housing, a stipend of $2,000, and up to $400 in travel expenses. The job includes reporting and writing for REASON, helping with research, proofreading, and other tasks. Previous interns have gone on to work at *The Wall Street Journal*, *Forbes*, and ABC News.

To apply, send your resume, up to five writing samples, and a cover letter to Gray Internship, c/o Sara Rimensnyder, REASON, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034. The deadline is March 15, 2001.



Dear Subscribers,

We hope your magazine arrives safe and sound each month. But if it doesn't—or if you have any other subscription problems—please accept our apologies and keep in mind these helpful hints:

■ Expiration Date

You will find your subscription expiration date printed above your name on the mailing label.

■ Change of Address

Please give us eight weeks' notice. Send both your old address (simply send us your current mailing label) and your new address to: Reason, P.O. Box 526, Mt. Morris, IL 61054.

■ Duplicate Copies

If you receive two copies of the same issue, check both mailing labels carefully—the slightest difference can cause problems. Then send us both labels, indicating which is correct, and we'll rectify the matter. (You may continue to receive a "complimentary" copy for a month or two.)

■ Billing Problems

The fastest way to solve a billing problem of any kind (billing error, duplicate invoice, et cetera) is to send us a letter explaining the error, plus any related invoice(s), and your mailing label. We will take corrective steps immediately.

REASON

P.O. Box 526
Mt. Morris, IL 61054
1-888-REASON-8
Subscribe@reason.com

REASON
www.reason.com

Editor-in-Chief
Nick Gillespie *(gillespie@reason.com)*

Senior Editors
Charles Paul Freund *(cpf@reason.com)*
Jacob Sullum *(jsullum@reason.com)*
Associate Editors
Brian Doherty *(bdoherty@reason.com)*
Jesse Walker *(jwalker@reason.com)*
Washington Editor Michael W. Lynch *(mwlynch@reason.com)*
Assistant Editor Sara Rimensnyder *(sarar@reason.com)*
Science Correspondent Ronald Bailey *(rbailey@reason.com)*
Editor-at-Large Virginia Postrel *(vpostrel@reason.com)*

Editorial Assistants Robert Honrado, Mary Toledo

Art Director Barb Burch *(bburch@reason.com)*

Webmaster Brian J. Taylor *(webmaster@reason.com)*
***Reason Express* Writer** Jeff A. Taylor *(jtaylor@reason.com)*

Contributing Editors
Gregory Benford, James V. DeLong, Edith Efron, Glenn Garvin, Steven Hayward, Thomas W. Hazlett, David R. Henderson, John Hood, Alan Charles Kors, Brink Lindsey, Carolyn Lochhead, Loren E. Lomasky, John McClaughry, Deirdre N. McCloskey, Michael McMenamin, John J. Miller, Charles Oliver, Walter Olson, John J. Pitney Jr., Thomas Szasz, Frederick Turner, Martin Morse Wooster, Cathy Young

Cartoonists
Chip Bok, Henry Payne, Scott Stantis

Publisher Mike Alissi *(malissi@reason.com)*
Circulation Director Alyssa Garey *(agarey@reason.com)*
Assistant Publisher Michael Orendy *(michaelo@reason.com)*

Legal Adviser Don Erik Franzen

Editorial and Production Offices
3415 S. Sepulveda Blvd., Suite 400
Los Angeles, CA 90034-6064
310-391-2245 Fax: 310-391-4395

Washington Office
1717 Pennsylvania Ave., NW, Suite 260
Washington, DC 20006
202-955-1324 Fax: 202-955-3187

Advertising Sales
The Townsend Group, Inc.
4920 Elm St., Suite 325
Bethesda, MD 20814
301-215-6710 Fax: 301-215-7704
(ads@reason.com)

Circulation Service
P.O. Box 526, Mt. Morris, IL 61054
1-888-REASON-8 (1-888-732-7668)
(subscribe@reason.com)

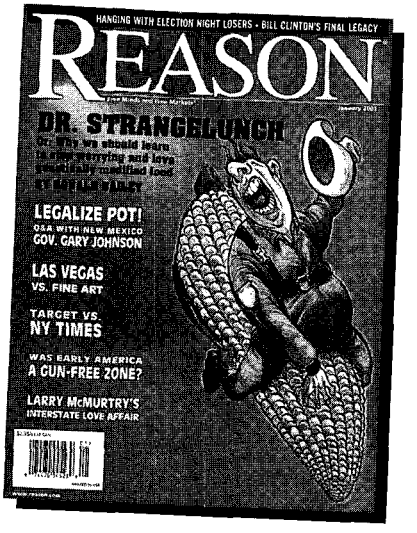
Reason is published by the Reason Foundation, a 501(c)(3) nonprofit educational foundation. Contributions to the Reason Foundation are tax-deductible. Signed articles in *Reason* reflect the views of the authors and do not necessarily represent those of the editors, the Reason Foundation, or its trustees; articles should not be construed as attempts to aid or hinder the passage of any bill before any legislative body. The claims and opinions set forth in paid advertisements published in this magazine are not necessarily those of the Reason Foundation, and the publisher takes no responsibility for any such claim or opinion.

Audit Bureau of Circulations Member

Reason Foundation
Trustees
Harry E. Teasley Jr. (Chairman), Thomas E. Beach, William A. Dunn, James K. Glassman, C. Boyden Gray, Neal I. Goldman, Stina Hans, Manuel S. Klausner, David H. Koch, James Lintott, Sarah A. O'Dowd, Robert W. Poole Jr., Al St. Clair, Denison E. Smith, Walter E. Williams, Frank Bond (emeritus)

President Lynn Scarlett
Vice President, Magazine Nick Gillespie

Letters


HANGING WITH ELECTION NIGHT LOSERS • BILL CLINTON'S FINAL LEGACY
REASON
DR. STRANGELUNCH
LEGALIZE POT!
Q&A WITH NEW MEXICO GOV. GARY JOHNSON
LAS VEGAS VS. FINE ART
TARGET VS. NY TIMES
WAS EARLY AMERICA A GUN-FREE ZONE?
LARRY McMURTRY'S INTERSTATE LOVE AFFAIR

Dr. Strangelunch

What a curious story Ronald Bailey's "Dr. Strangelunch" (January) is for a magazine of "free minds and free markets" to print. Let me count the ways.

First: What's so wrong with wanting to know what is in my food? We always argue that if people have all the information they will make the best decision, and market forces will prevail for the general good. I'd say biotech promoters are afraid I'll make the "wrong" decision if I have this information. Wrong for them, that is.

Second: History is replete with good science gone bad. With Thalidomide, radiation poisoning, introduced animal and plant diseases, introduced invasive species, and more, we've seen the law of unintended consequences at work. Research into biotech is surely a good idea. But research for only a handful of years is risky considering some biotech crosses species and animal/plant boundaries never before seen in nature. This is not your father's breeding program. It is entirely new science. We should take extra precautions to protect our biosphere from mistakes now unforeseen.

Third: Just because we question biotech doesn't mean we want people to starve or go without vitamins. I'm so offended by this argument. Mr. Bailey is basically saying either agree with me (i.e., with biotech) or you are a bad person. Rubbish. We need an open, honest discussion about this subject. We should be allowed to know what is in our food. We shouldn't have to buy "organic" because we aren't allowed to know if the regular food is transgenic or not.

Last: I am a horticulturist, so I know some science. Science is a way of looking at the world, of questioning what we see and learning from it. Biotech surely has promise, but let's take it slowly. Hopefully biotech will be a safe technology and not a disaster. Only time will tell.

Meanwhile, I want to know what I am feeding my kids.

William Keith
Olympia, WA

I'll stop worrying and love genetically engineered food when its producers start labeling all the ingredients in it, as they do with all other food. As a vegan (for health reasons) who also has food allergies and other dietary limitations, I read every ingredient and avoid like the plague any food that could do me, personally, more harm than good.

The biotechies need to learn to stop worrying that labeling would kill sales. Why should anyone avoid tomatoes with flounder genes if they eat fish anyway? On the contrary, the failure to label makes folks stay away in droves, trying to avoid anything that *might* contain genes that could harm them.

Lynn Herrick
Austin, TX

Genetically modified food will never be the solution to the problem of an ever-increasing human population trying to survive on diminishing resources. Per Pinstrup-Andersen of the International Food Policy Research Institute, who is quoted in the article, misses the big picture when he talks about giving GM food to low-income single mothers trying to feed five children on an acre of land in West Africa. "Access to all the options" must include education and birth control choices so she can opt not to get herself into that situation in the first place.

Sandy Coobac
Kewadin, MI

Ronald Bailey replies: First, Mr. Keith and Ms. Herrick, there's nothing wrong with wanting to know what's in your food. However, the rest of us shouldn't have to pay for that curiosity. The problem here is not the market, but regulation. The imposition of expensive labeling requirements would lead inexorably to the duplication of all sorts of food handling facilities, grain elevators, mills, shipping containers, railroad cars, and more. Instead of paying extra to buy organic, you would prefer that we all pay higher prices. The good news for you is that the FDA is devising a labeling scheme for producers who want consumers to know that their foods are not genetically improved. Of course, those non-biotech foods are likely to cost more.

As for unintended consequences, Mr. Keith is right: someday something will go wrong, as it has for electricity, cars, computers, etc. But we shouldn't deny ourselves the benefits of a new technology just because we cannot foresee every consequence. We should proceed by trial and error and ameliorate problems as they arise. Thalidomide is a particularly telling example. The sedative maimed thousands of children but now is widely used to treat some 130 diseases. And when would Mr. Keith ever agree that biotech crops were safe? Already, seven national academies of science have declared them safe. The American Medical Association has also backed biotech's safety—and stated that it opposed labels.

What's so risky about crossing species boundaries? There's no evidence of any systemic risk from switching genes between species. Incidentally, a good percentage of human DNA originally came from retroviruses and bacteria. And of course no one wants people to starve. Yet starvation is likely to be an unintended consequence of opposition to biotech.

Ms. Herrick, genetically enhanced corn does not have extra ingredients. It's just corn. Producers today don't separately list the various hybrids of corn, wheat, or soybeans, all of which have different nutritional properties, because that information is not relevant to consumer safety and food quality. It's the same with biotech crops. With regard to food allergies, the really good news is that biotech techniques will allow companies to remove many allergens from the "natural" crop plants that contain them, making food even safer for more consumers.

Ms. Coobac, no one, including Per Pinstrup-Andersen, has ever said that biotech food can solve all the world's problems, but it will surely play a role in ameliorating some of them. Also, Pinstrup-Andersen is not talking about "giving GM food to low-income single mothers," but rather providing them with GM crop seeds to plant and harvest. By the way, the African women of whom he was speaking are not generally "single mothers." It's just that traditionally, women grow most of the food in Africa.

Shaky Ground

As a custom builder and developer specializing in log homes, I can express amazement that the Hampshire couple in "Shaky Ground," by Gene Callahan (January), were able to complete the process so quickly. In many cases, it's really far, far, far worse than he described. And we the people just keep shuffling backwards, smiling graciously, hoping for another reasonable bureaucrat to help us.

Toni Reita
Goldendale, WA

I read with interest Gene Callahan's article on the tyranny of officials with discretion and his call for less bureaucratic latitude and clearer rules. As the chief building code official of a large eastern subdivision for the past 20 years, I have studied and participated in this process.

Land regulation presumes that one property owner's liberty must be constrained at the point where it threatens the liberty of another. Agreeing on the exact location of that point is, of course, the problem. I have heard from people who think any constraint in their use of their property is outrageous; others think the law should regulate what color their neighbor paints his front door.

Once decided on, these controversial constraints are codified in the form of regulations. Regulations, no matter how carefully written, can never anticipate the full range of situations to which they will apply. And, as has been clear since the days of Max Weber, the idea behind bureaucracy is to limit individual discretion, and hence arbitrariness. Ideally, a bureaucracy acts strictly according to clear and predictable rules. But we have a conflict: The complexity of individual cases requires flexibility, while the bureaucratic structure emphasizes rigidity. This problem is compounded by the conflicting attitudes of applicants themselves; most want predictability so they can know the requirements, but also flexibility if they can't meet them.

Making matters even worse, regulation has collected on the body of the law like barnacles on a barge. In addition to the many laws already in place, you may rest assured that people are busy dreaming up new ones. One such new law, already in place in several jurisdictions, requires that individual homes be accessible to the disabled. The paradox is that many people say they want less regulation of themselves, but support more regulation of everyone else. So laws proliferate.

Having been involved in some of the review boards, I often feel like a Florida election official: No matter what decision is made, someone will cry foul. A more cynical bureaucrat might say that an impartial decision is one in which all parties are equally unhappy. Given the realities of government, politics, and human nature, there is no magic solution. In practice, the decisions of these bureaucrats or boards can be arbitrary or even nonsensical at times, but for the most part, these decisions represent attempts to reconcile broad laws, specific conditions, practicality, alternatives, individual hardship, and the ever-elusive "public good."

John Reisinger
Towson, MD

Communicate with REASON

We appreciate your letters, typed double-spaced and limited to 250 words. Letters sent to REASON will be considered for publication (unless otherwise noted) and may be subject to abridgment or editorial comment. Any letter intended for publication must include the sender's name, address, and daytime telephone number. Letters may be sent to letters@reason.com or mailed to:

3415 S. Sepulveda Blvd., Suite 400
Los Angeles, CA 90034-6064

An examination of how local governments work might shed some light on Gene Callahan's complaint in "Shaky Ground." First, "bureaucrats with discretion" is an oxymoron. Bureaucracy is intentionally a factory assembly line applied to human activities. It is rule-bound, intended to treat everyone exactly the same (to avoid the favoritism or "deals" associated with "boss" political systems). But that's the major complaint about it—that it doesn't take individual circumstances into account. Government employees who deal with the public are often bound by the laws adopted by elected officials.

Discretion, on the other hand, is commonly bestowed on boards and commissions appointed by the elected officials. Boards and commissions are made up of appointed citizens, not government employees. They may be community-minded volunteers or they may be campaign contributors with a financial interest in the business of their boards. They meet once or twice a month and may have limited knowledge of the technical or public policy aspects of whatever they oversee. They certainly don't have the knowledge of the subject matter that day-to-day administrative employees should have. Also, the members often come from backgrounds in which they have little or no experience in exercising authority, and some exercise it with tyrannical fervor when they have it.

My reading of Philip Howard's *The Death of Common Sense* is that he wanted administrative officials (government employees) to have discretion in applying regulations. Arbitrary exercise of discretion would quickly get out of hand if one had to apply it every day, so constant experience results in more sober judgments. With administrative discretion, many requests would never go in front of a board or commission and be subject to their more probable arbitrariness.

Simply having a book of rules (bureaucracy) has not been satisfactory. The elected officials who put those rules into law never think of all the circumstances under which they might be applied. Furthermore, elected officials could never pass laws that were too specific. It would be impossible to satisfy all of their individual and conflicting objectives and get a majority vote if there were not some deliberate ambiguities in the law. (See almost everything that passes state legislatures and the U.S. Congress.)

As we always discover when the pendulum swings too far, extremes don't work. With rule-bound bureaucracy at one end of the spectrum and unfettered discretion, with its stew of biases, at the other, we have to find methods somewhere in between.

G. David Robinson
Bartlett, TN

God and the State

Cathy Young's "God Talk" (January) presents a number of borderline cases where it is alleged that our nation's traditional "wall of separation" between church and state is sometimes being preserved at the expense of violating First Amendment freedom of speech rights.

As is often the case in freedom-of-expression controversies, the instances cited seem to be based on the implicit assumption that one's rights are violated simply by a refusal to grant the requested means of expression, such as a school auditorium or public address system. One is reminded of past cases when students protested that freedom of the press was violated when schools refused to allow the use of their facilities for the publication of material of which they disapproved.

Recognition of speech rights does not require providing the location or other property needed for delivering the speech in question. This is quite clear where the property in question is privately owned (which, ideally, should be the case with schools). In the case of property funded by taxpayers, there is, of course, the underlying question of what rights taxpayers and others have regarding the functions for which such property may be used. A reasonable answer would be that its use should be restricted to the purposes for which it is intended. In keeping with the important church-state separation principle, this should clearly be non-religious.

Cathy Young tells us that a certain attorney claims "rather persuasively" that it is part of the American way that we are sometimes forced to listen to speech we don't like. If "forced" means that we sometimes encounter situations where it is difficult, inconvenient, or embarrassing to avoid certain speech, then the statement is essentially correct, and no violation of rights is involved. But if "forced" denotes coercion by others, especially by agents of government, such is certainly not the "American way," and ought always and everywhere to be staunchly resisted and denounced.

Joseph Curran
Daly City, CA

I am surprised that in "God Talk," an interesting but entirely beside-the-point analysis of the tensions between First and Second Amendment rights in tax-funded schools, Cathy Young got nowhere near proposing the straightforward solution to the problem: Stop funding schools with tax money. The closest she got was a quick parenthetical remark about vouchers, which are still funded by the government and therefore susceptible to the same tensions.

Every social issue addressed by spending tax money raises the same problems: The solutions are forced on people (or rather, on the minority who voted against the tax), and control rests with some government group rather than with the people who provided the funding.

The answer I'd like to see? Repeal education taxes; privatize existing schools; send your child to the school of your choice, paid for by your money, where the curriculum, speech code, dress code, behavioral code, and so forth are to your liking.

Lloyd Botway
Los Angeles, CA

Gun Shy

Joyce Malcolm's review of Michael Bellesiles' book *Arming America* ("Concealed Weapons," January) missed the book's main point.

Central to America's gun culture is the belief that gun ownership is an individual's right going back to colonial days. Whatever you think about Bellesiles' use of probate records, he does present sufficient evidence that gun ownership was not considered an individual's right in colonial days, so much as a duty of some

persons arming to protect themselves against others.

Governments often encouraged and legislated gun ownership for the purpose of protecting the community against uprisings by Native Americans, slaves, and indentured servants. There were many laws restricting gun use. Laws were often passed that prevented gun ownership by all except male, white, free, property-owning, Protestant citizens. We have to understand that there were no police as we know them, and the militia were organized and often armed by the government to protect the haves against the have-nots.

Another position taken by Bellesiles that seems very strong is the contribution of the gun makers after the Civil War to the idea of gun ownership as an American right. The fact that privately-owned guns proliferated from a few thousand at the beginning of the 19th century to several million at the end of it points to considerable marketing expertise on the part of gun makers. We should give credit where credit is due. Making guns seem a part of the authentic American experience was indeed a successful part of that strategy.

William H. DuBay
Costa Mesa, CA

Joyce Malcolm replies: Mr. DuBay raises important issues and I am happy to reply. The chief point of *Arming America*, as he writes, is the claim that there was no individual right to have firearms going back to colonial days. But Bellesiles' evidence for this contention is incorrect.

He dismisses the right of Englishmen, affirmed in their Bill of Rights, to have private arms. Originally a right for Protestants, 90 percent of the population, this was extended to all Englishmen during the 18th century. Since every American colony's charter guaranteed settlers the same rights as those born and abiding in England, the American colonists had an individual right to be armed a century before the Revolution.

Bellesiles devotes only a page and a half of his 450-page book to the passage and meaning of the Second Amendment. This cursory coverage ignores the wealth of testimony by contemporaries, including the Founding Fathers, that the amendment was meant to protect an individual right. Instead he points out that guns continued to be restricted because Indians and slaves had no right to be armed. Neither group had the rights of citizens and all rights had some restrictions. They were nonetheless rights.

As for the increase in guns after the Civil War, the numbers did not proliferate from a few thousand at the beginning of the 19th century because there already were hundreds of thousands of guns in private hands. Where Bellesiles finds only 14.7 percent of white men had firearms during the colonial era, four independent studies of probate inventories, Bellesiles' main source of evidence, found 54 percent to 78 percent of adult white men owned at least one firearm. If numbers of guns make a gun culture, there was already a gun culture in America in the 18th century. No one had to make guns seem a part of the authentic American experience. They already were.

Join *Accuracy In Media* today and receive this brand new book absolutely free!

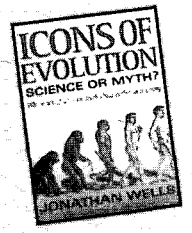
This is a $21.95 value and it's yours free for joining today for just $49.95.

Your membership will entitle you to 24 issues of our newsletter, the ***AIM Report***. The ***AIM Report*** has been exposing the biases and distortions presented as news by the liberal media.

In addition to the newsletter your membership entitles you to specials discounts at AIM Conferences and in our online store at **www.aim.org**, where you can save as much as 75% on selected items.

So don't delay, join today by sending in the coupon below or calling us at **1- 800-787-4567 ext 110** for faster service. The ***AIM Report*** also makes a great gift!

ICONS OF EVOLUTION



Jonathan Wells has news for you. Everything you were taught about evolution was wrong. Every iconic image—from the "primordial soup" to the changing colors of moths in industrial England, to the ascent of man—is, says Dr. Wells, either inconclusive, incomplete, or even outright fraudulent. Wells commands readers to sharpen their critical thinking and challenge the integrity of scientific thought, while arguing for greater honesty in the continuing, contentious debate over evolution.

RMA2

Accuracy In Media
4455 Connecticut Ave., N.W., Suite 330
Washington, DC 20008
(202)-364-4401 - (202)-364-4098 Fax
1-800-787-4567 Ext: 110
E-mail: ar1@aim.org

#
Exp Date:

Name:
Address:
City:
State:
Zip:

☐ Check Enclosed ☐ Charge my:
☐ Visa
☐ Master Card
☐ American Express
☐ Discover Card

☐ One year subscription to the AIM Report for $49.95 (Includes a Copy of: ***(Icons of Evolution)***
☐ One year subscription to the AIM Report for $35.00 (No book)
☐ ___ Copy (ies) of ***Icons of Evolution.*** $21.95 postpaid. (List price $23.95).
☐ I want to help with an additional contribution of $_____

Citings

Hate Squad

By Charles Paul Freund

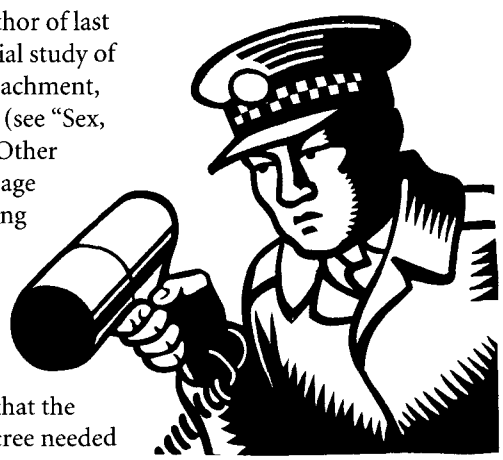
Concern about "hate crimes" is resuscitating the Chicago police department's long-dormant Red Squad, an intelligence unit that specialized in infiltrating, harassing, and gathering intelligence on political groups. Since 1981, Chicago's cops have been under a consent decree that greatly limited such activity: They couldn't start spying on a group until they had evidence that a crime was likely to be committed. But in January, reports the *Chicago Sun-Times*, the 7th Circuit Court of Appeals untied the Chicago cops' hands by modifying that decree.

The court ruled that threats from "terrorists" and "hate groups" presented a greater danger than police harassment and spying. "If the investigation cannot begin until the group is well on its way toward the commission of terrorist acts," it declared, "the investigation may come too late to prevent the acts or to identify the perpetrators." The decision was written by Judge Richard Posner, the court's chief judge and the author of last year's controversial study of the Clinton impeachment, *An Affair of State* (see "Sex, Economics, and Other Legal Matters," page 36). Posner's ruling was hailed as a victory for Chicago Mayor Richard J. Daley Jr., who has long argued that the 1981 consent decree needed modification.

While a police spokesman termed the decision "a tremendous victory for common sense," the American Civil Liberties Union called the ruling "a significant setback." Police will again be able to amass databases on groups whom they think might commit terrorist acts and hate crimes, though a city official has claimed in the *Sun-Times* that the police will still not be able to use such intelligence to harass or intimidate dissidents. Officials also argue that the current Chicago police force is younger and "better educated" than the cops of 20 years ago.

The ruling may offer a lesson in the malleability of police restraint. Over the past century, police have at various times been allowed to infiltrate and gather intelligence on a series of groups perceived as special threats, from anarchists to Bolsheviks to black nationalists to Old and New Left radicals, only to have such police activities later condemned and "regretted." The rhetoric of the "special threat" has in recent decades encompassed potential domestic terrorism, and now it focuses increasingly on perpetrators of "hate crimes."

According to the *Sun-Times*, Mayor Daley focused his campaign to change the consent decree on such crimes, citing in particular a gunshot attack last fall against a local rabbi, and the menacing of Jewish pedestrians in the city, who were reportedly targeted by slingshot.

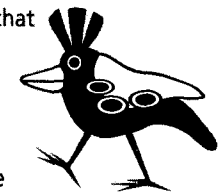


Balance Sheet

By Jeff A. Taylor

ASSETS

△ ▲ **Pond Scam.** The Supreme Court finds that the Clean Water Act of 1972 does not apply to seasonal ponds used by migratory birds. Mudflats and gravel pits swollen by rain or melt water had gained officially protected status under the Army Corps of Engineers' reading of the law, making the land off-limits for building.



△ ▲ **Full Reverse.** Federal Reserve Chairman-for-Life Alan Greenspan executes a rare public policy about-face and cuts interest rates by a full point in just weeks. Such a move usually takes the Fed months, far too slow to help a rapidly cooling economy.

△ ▲ **Bundle Baby.** In another twisted outgrowth of the 1996 Telecom Act, a federal appeals court rules that the Federal Communications Commission erred in exempting advanced data services from the requirement that Bell companies sell their services "unbundled" from other pricey add-ons. The ruling may slow the Bell march to data dominance, but only true deregulation can stop it.

△ ▲ **Candid Camera.** An Omaha jury rejects a wrongful-termination suit against Wal-Mart. The former employee had given the authorities a customer's photo showing an infant crawling amidst a pile of marijuana. The child ended up in foster care. But Wal-Mart's policy says only upper management can make such a call.

△ ▲ **Metal Worker.** A California judge dismisses a lawsuit claiming that music from thrash metalists Slayer caused three teenagers to kill a 15-year-old girl as a satanic sacrifice in 1995.

△ ▲ **H2-Ownership.** Ontario explores allowing the private sector to run water systems for the province. An estimated $9 billion overhaul is needed for a system that has been blamed for deaths due to bad water.

Silencing Cellular

By Sara Rimensnyder

When are people going to learn not to make threats over cell phones? In Pennsylvania in 1993, a disgruntled teachers union negotiator, chatting to colleague Gloria Bartnicki on the old wireless, suggested they might need to "blow off the front porches" of school board members' homes in order to get a salary increase. Days later, disc jockey Frederick Vopper was airing the tape on two different radio stations.

Bartnicki sued Vopper, the stations, and the man who supplied Vopper with the tape (who says he received it from an anonymous source), citing federal and state laws that ban the disclo-

▼ **Cell Division.** President Bush flirts with ending federal funding for research on embryonic stem cells, or any tissues gained from induced abortions. Some $20 million funds grants for research on vaccines, Parkinson's disease, and Alzheimer's.

▼ **Potter Patter.** Dijon University lecturer Pierre Bruno declares Harry Potter a "class enemy" and a "dangerous role model," Hermione, Harry's girl sidekick, a "stupid ineffectual bookworm," and Harry's school house of Gryffindor "the ascendant class of the bourgeoisie." Now you see the violence inherent in the system.

▼ **Hard Currency.** Campaign finance scourge Sen. John McCain (R-Ariz.) asks for hard money donations to his PAC so he can turn around and ban soft money donations. "I hope you will send in a contribution of $75, $50, $25 or whatever you can afford at this time," reads a letter to donors. More money "will send a clear message that we have the strength and resources to get our reform agenda passed."

▼ **Hack Attack.** India and Pakistan extend their fruitless rivalry to cyberspace. Indian authorities claim many attacks on Indian Web sites can be traced to Pakistani hackers.

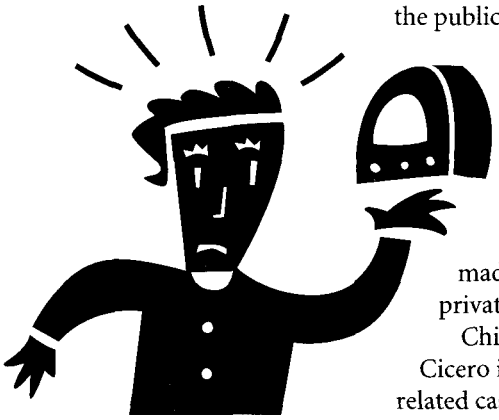
▼ **Instant Mess.** With its restrictions on how AOL Time Warner can use its instant messaging software, the Federal Communications Commission strides into new regulatory vistas. If the system ever carries voice or video, other companies get a mandatory piece of the pie.

▼ **Board Senseless.** San Francisco moves to revoke a charter school's five-year contract with Edison Schools. Although the elementary school showed big gains under Edison, the new school board president says the board is now "philosophically opposed to for-profit management."

LIABILITIES

sure of recorded cell phone conversations. Eight years later, the case has arrived at the U.S. Supreme Court.

The justices heard oral arguments in early December, and now need to hash out whether a free press can trump privacy rights. It's a hairy issue, but an important one, since reporters acting in the public interest often depend on legally verboten sources to get their story. Meanwhile, individuals want assurance that remarks made in private remain private.



Chicago lawyer Frank Cicero is defending the related case of Rep. Jim McDermott (D-Wash.), who was accused of furnishing *The New York Times* with an incriminating tape of Republicans discussing then–House Speaker Newt Gingrich's impending ethics troubles. Cicero notes that in the majority of cases in which the courts have privileged privacy rights over free speech, the disclosed info was personal, not significant to public welfare. "The [tape aired in the] Bartnicki case was clearly in the public interest," he adds.

A decision for Bartnicki could dissuade journalists from fulfilling a primary mission—to expose public corruption to outside scrutiny. But if the court favors Vopper, a word to the wise: Don't use a cell phone to plot your next assassination.

Unsanctioned Webs

By Jesse Walker

Critics have long charged the Internet Corporation for Assigned Names and Numbers, the authority that assigns domain names, with artificially choking off the number of possible Web addresses. It's nice to have a site called reason.com, they suggest, but why not a reason.magazine, or a reason.foundation, or even (for our foes) a reason.sucks? Late last year, ICANN recommended that seven new top-level domains be adopted, including .aero for air transit sites and .coop for cooperatives. But why stop at seven? There's no good reason not to have 50 or 100 new domains: Surfing would be easier, with shorter addresses to remember; cybersquatting would be less of a problem, since it would be harder to buy up all the possible per- ▶

SOURCES

Politicians and pundits are blaming California's electricity woes on deregulation, but **it's pretty hard to argue that the Golden State's "electricity deregulation" was anything of the kind**. To find out what went wrong—and how real deregulation could help prevent similar disasters in the future—visit the Reason Public Policy Institute's special Web site on the power crisis (**rppi.org/electricity/index.html**). The Cato Institute has also created a useful electricity page (**cato.org/electricity/index.html**)—and then, of course, there's REASON magazine and REASON Online's coverage of the issue, helpfully collected at **reason.com/hod/electricity.html**.Check out REASON editor-at-large Virginia Postrel's frequently updated observations on current events and ideas. **Visit The Scene at dynamist.com/scene.html**.

QUOTE

"The enormous changes in women over the past 40 years are constantly...attributed to the organized women's movement of the late 1960s and '70s. But that movement was merely a symptom or corollary of a profound transformation in American society after World War II. ...Our energy and assertiveness weren't created by Betty Friedan... or by Gloria Steinem.... **Popular culture—above all rock 'n' roll, with its African-American R&B roots—did far more to radicalize us than did any feminist leader."**

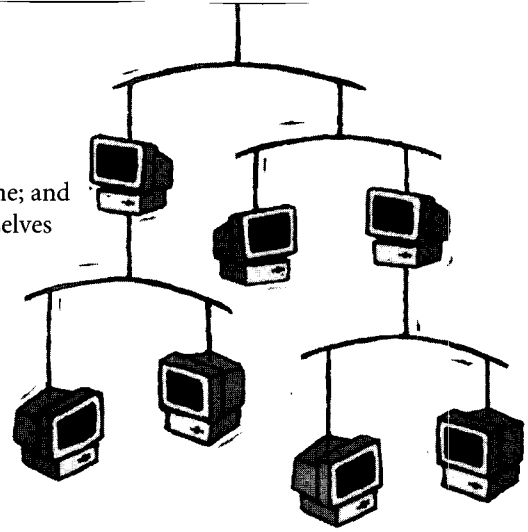
—Camille Paglia, in *Salon*, February 7

BRICKBATS

◆ Twelve of the most widely used middle-school science textbooks are riddled with errors, according to a study funded by the David and Lucile Packard Foundation. In one text, a map showed the equator passing through the southern U.S. In another, a photo of singer Linda Ronstadt was labeled as a silicon crystal. "The books have a very large number of errors, many irrelevant photographs, complicated illustrations, experiments that could not possibly work, and drawings that represented impossible situations," said one researcher. About 85 percent of U.S. students use at least one of the books.

◆ Michigan Lawsuit Abuse Watch just held a contest for wacky warning labels. First place went to the warning in a pair of athletic shin guards: "Shin pads cannot protect any part of the body they do not cover." A runner-up prize was found on a power drill: "This product not intended for use as a dental drill." And an honorable mention went to this message on a rock garden set: "Eating rocks may lead to broken teeth."

◆ Denver police arrested 147 people in no-knock drug raids in 1999, according to the *Rocky Mountain News*. But just 49 of those people were ultimately charged with felonies, and only two were sentenced to prison time. By comparison, 21 percent of all felony defendants in Denver that year were sentenced to prison.



mutations of a person's or company's name; and domains themselves would be cheaper.

While ICANN dithers, some rival registries have been assigning new addresses of their own. The best-known are Image Online Design and Name.Space, both of which have been around for years. The former lets you register sites with the suffix .web. The latter has opened up hundreds of options, from .art to .zine. These exist outside the root server run by Network Solutions, the company with a monopoly on ICANN-approved addresses, so you have to reconfigure your computer to reach them. It's unclear how many pages exist *only* in these alternative online universes, and how many are merely staking their claims now, in hopes that ICANN will adopt more top-level domain names and let these alternative registries control the domains they pioneered.

Good luck. Before announcing the latest assortment of top-level domains, ICANN required organizations applying to run new dot-somethings to pay a hefty $50,000 fee just to be considered. "It was a clever move by the ICANN people," argues Milton Mueller, an associate professor of information studies at Syracuse. It raised a lot of money, and it pleased trademark-holders, many of whom were afraid their intellectual property would lose value in a world of domain-name plenty.

"They probably thought they'd get something like 12 applications, and the process of narrowing it down to seven would be easy," Mueller adds. Instead, more than 40 groups applied.

Both Image Online Design and Name.Space were among the hopefuls, but neither group's application was accepted. "They definitely got a raw deal," says Mueller. "They were operational registries. They played by ICANN's rules. The reason they didn't get an award is politics—pure politics."

Christopher Ambler, president of Image Online Design, won't put it so strongly, but he's clearly disappointed. "ICANN's decision was based on clearly incorrect information," he says. "We paid $50,000 for a thorough, objective analysis, and we received neither." Ambler's company has appealed ICANN's decision, as have several other disappointed applicants. Meanwhile, the American Civil Liberties Union and other groups sent a letter to the Department of Commerce in January, asking it to hold a public hearing before adopting ICANN's selections.

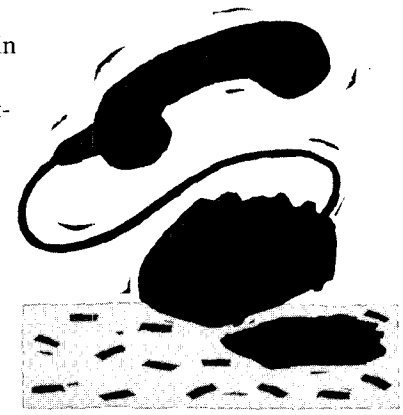
Hell's Bells

By James K. Glassman

The Telecommunications Act of 1996 was supposed to open up the local phone loop and end the so-called Baby Bells' monopolies. Instead, the Bells filed lawsuits to protect their privileges, then dragged their feet; now they're appealing to politicians for help. The result: more monopolies. In 1996, there were eight local companies—the seven Baby Bells plus GTE. Now there are only four. Verizon—a combination of BellAtlantic, Nynex, and GTE—had $65 billion in revenues in 2000, up from $13 billion in 1996. SBC Communications—formed from Southwestern Bell, PacTel, and Ameritech (the Bell of the Midwest)—has a market capitalization of more than $160 billion, twice that of AT&T.

These companies monopolize the last mile of telecommunications into the home, a status protected by state regulators. As a result, they have steadily increased their returns. Even Bell South, a relative laggard, had a 26 percent return on equity in 1999, compared with 13 percent as recently as 1993.

Further evidence that the Bells are winning a war of attrition came after Thanksgiving weekend. Covad Communications Group, one of the largest upstarts to enter the high-speed Internet data transmission market, announced not only that it was laying off 400 workers, but also that it would stop build-



ing out its DSL network. Analysts are predicting that data communications will grow at an annual rate of 70 percent over the next few years, and the high-speed service Covad provides seems like just what people want. Yet the one-time darling of investors has seen its stock plunge 93 percent in the past year. In an attempt to stay in business, it has sold a 6 percent stake to SBC. Covad isn't the only company to cut back an expansion plan and seek a partnership with a Bell: NorthPoint, for example, will soon merge into Verizon.

In theory, the Telecom Act required the Bells to unbundle their networks and sell components to competitors at discounted rates. The carrot was that when there was sufficient competition, they'd be allowed into the long-distance business. But the Bells have sidestepped those rules. And now, with breathtaking audacity, they're trying to gut the Telecom Act's requirements. The Internet Freedom and Broadband Deployment Act—a true misnomer—would let the Bells immediately enter the long-distance data business and, soon after, the rest of long-distance services. The law would do so without opening local service to competition.

Meanwhile, the Bells are creating a thicket of new problems for their biggest potential competitor, the cable television industry. Arcane restrictions already make it impossible for cable companies to provide phone service to anywhere near the percentage of households that the Bells do. The Bells propose to hobble them some more, funding campaigns to force cable companies to open their lines to all Internet service providers.

The local monopoly lives—and grows. Without firm action, the Telecom Act's 5-year-old promise of greater choice will instead come down to this: the Bells, the Bells, only the Bells.

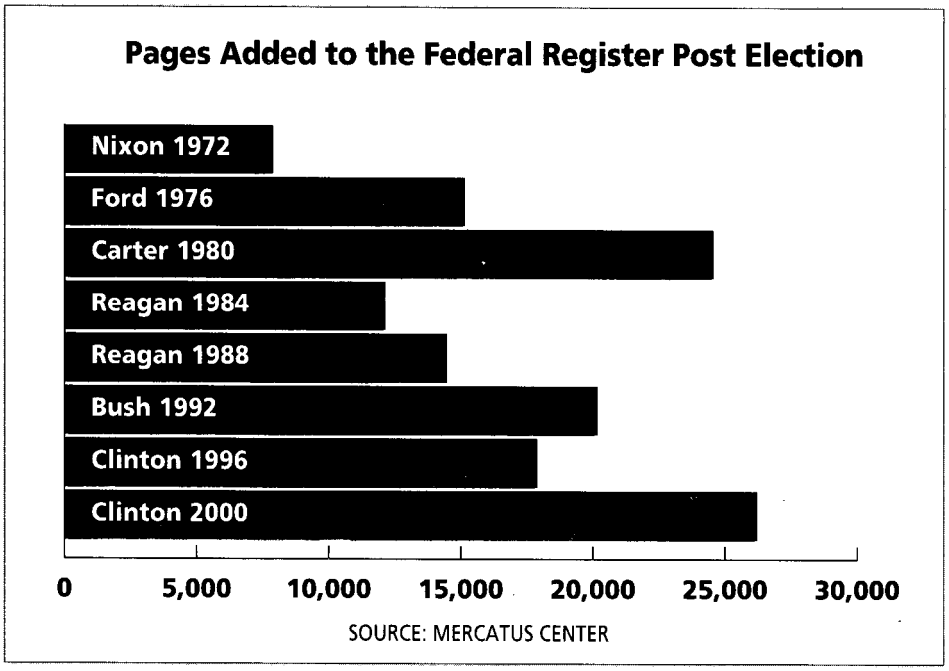
DATA

Midnight Scramblers

By Michael W. Lynch

A pile of pardons wasn't the only stack of unseemly paperwork former president Bill Clinton worked on before leaving office. He also left a pile of "midnight regulations," last-minute additions to the Federal Register. Clinton was vastly prolific in his last three months, adding some 26,000 pages worth of dictates that ranged from creating new federal monuments, regulating the temperature at which eggs must be kept during shipping, and prohibiting companies that get on the wrong side of organized labor from contracting with the federal government. In doing so, the Man from Hope handily topped the recent record, which had been set by Jimmy Carter on his way out the White House door.

Don't think midnight regs are a Democratic thing. A study of the past 14 presidential administrations by George Mason University economist Jay Cochran finds that Republicans are quick to churn out the same copy. "There's a perception in DC that Democrats are regulators and Republicans are deregulators, but the data just don't support that conclusion," says Cochran, who conducted his study for GMU's Mercatus Center. "The partisan effect is zero."



Got Shrooms?

By Sara Rimensnyder

Lore has it that mushrooms are aphrodisiacs, but lately they've been stirring more spleen than lust. Growers of the tasty fungi have been fighting each other in court over whether the government can force companies to join collective advertising efforts. In late November, the Supreme Court agreed to hear the case, and oral arguments likely will be heard in the spring.

The skirmish began in 1996, when one of the country's largest mushroom producers, United Foods, refused to pay its $8,000 monthly tab from the Department of Agriculture for generic, industry-wide advertisements. Among other complaints, ▶

BRICKBATS

◆ Laura Howard was an honors student who had never been in trouble at school. When she was called to the principal's office at her Selma, North Carolina, high school, she thought she might have forgotten to display her parking pass. Instead, she was told the sheriff's office had conducted a drug sweep of the school and a drug-sniffing dog had found a cigar in her car that they thought contained marijuana. Under the school's zero-tolerance program, she was suspended immediately. Four months later, the school got the lab results back from the state Department of Justice; the cigar contained no illegal substances. The lab report was dated some six weeks earlier.

◆ The French government has forbidden civil servants from using the terms "startup" and "e-mail." The goal, they say, is to limit the spread of English words through the Internet.

◆ Meanwhile, in Halifax, Nova Scotia, Canada, junior high school students walked out of class to protest a strict no-touching policy. The students say the policy bans even innocent contact, such as hugs, back slaps, and high-fives.

◆ And in Valencia County, New Mexico, Richard Pitcher and Kimberly Henry have been charged with cohabitation, a violation of a state law banning unmarried couples from living together. The charges were filed by Pitcher's ex-wife.

—Charles Oliver

the company argued that the requirement violated the First Amendment by forcing speech and thwarted its efforts to differentiate its mushrooms from those of its rivals.

The Justice Department, backed by many mushroom purveyors, took United Foods to court. Although the government won the initial trial, an appeals court judge reversed the decision, agreeing with United Foods that compulsory advertising payments were unconstitutional—at least in agricultural industries that are not heavily regulated, such as mushrooms.

The Department of Agriculture manages mandatory advertising programs for many such commodities, including honey, milk, and beef. The Supreme Court's decision could affect all of these programs. The court several years ago supported the government's right to require advertising fees in the heavily regulated California peach, plum, and nectarine industries. The Supremes' decision to revisit the issue suggests that they may wish to clarify their original ruling.

Together, mushroom merchants pay about $1.5 million a year to advertise their product. One industry insider who supports collective advertising—because, he says, "it works"—gets philosophical when asked about United Foods' position. "Some people just want to control their own destinies," he says incredulously.

The Ghost of Energy Crisis Past

By RiShawn Biddle

Take a ton of coal dust, spray on a binder of latex or tar, and turn it into briquettes. Then call it a synfuel and sell it for $20 to a utility. That's for less than the cost of production, but you'll still reap a fortune: The federal government will give you a tax credit that can exceed $26.

Thank Congress and the Carter administration for such a sweet deal. In the midst of the '70s energy crisis, the federal government came up with a scheme to encourage the development of synthetic fuels. Known by the bland name Internal Revenue Code Section 29, the program hands out tax credits for synfuels. It languished on the books for 20 years until companies figured out a way to mine it. Now plenty of companies are cleaning up on the credits, including General Electric, insurance broker Arthur J. Gallagher & Co., and such utilities as Progress Energy and ScottishPower. One company, the Tampa-based TECO Energy, used its two synfuel plants to reduce its income tax rate by 57 percent.

Another winner is Headwaters Inc., of Salt Lake City, a 13-year-old outfit that changed its name six times and lost money growing alfalfa and trading bank notes. Thanks to the royalties it collects on its eight synfuel patents, Headwaters experienced a sixfold gain in revenue to $46 million in fiscal year 2000, earning its first profit. Almost half of the 55 IRS-certified coal synfuel plants use Headwaters' IRS-approved process.

Resource Data International, an energy consulting firm in Boulder, Colorado, believes coal synfuel production tripled last year to 10 million tons, and expects it to increase another fourfold by 2003. Synfuel operators could gain $1 billion in tax abatements by then. One company alone estimated it could generate up to $240 million a year in Section 29 credits.

Yet Section 29 is hardly reducing the nation's dependence on oil, since it's displacing already plentiful coal. And some suspect that synfuel operators are using otherwise marketable coal instead of recovering true coal waste. "You can spray anything you want on it, so long as the facility is blessed by the IRS," notes Forrest Hill, an Annapolis, Maryland-based consultant.

But perhaps not for long. Last October, the Treasury Department, at the behest of traditional coal producers, three members of Congress, and the governor of Ken-

tucky, suspended certification of additional synfuel plants until it could make such a determination. Defending the synfuel operators: a political A-list that includes Sens. Orrin Hatch and Robert Bennett of Utah and Sen. Bob Graham of Florida.

Why Breed Distrust?

By Ronald Bailey

In January, the Food and Drug Administration released its revised regulations for foods produced using biotechnology. The new regs were a bit more onerous than what had come before, but not nearly enough to satisfy some pressure groups in Washington. One such group, the Consumer Federation of America, released a new 258-page report, *Breeding Distrust: An Assessment and Recommendations for Improving the Regulation of Plant Derived Genetically Modified Foods.* The report calls for the U.S. to model its biotech regulations on those developed by the European Union and Brazil—not generally considered hotbeds for technological innovation.

"Both the EU and Brazil have adopted process-oriented regulatory programs aimed at all GM [genetically modified] organisms," the report notes. "The laws in the EU and Brazil broadly encompass all GM foods because they include all GM organisms within their scope."

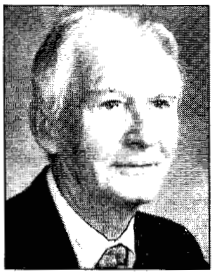
The FDA specifically rejected the EU and Brazilian models in 1992, declaring that whether a food is safe depends on what's in it, not how it's made. It further declared that "in most cases, the substances expected to become components of food as a result of genetic modification of a plant will be the same as or substantially similar to substances commonly found in food, such as proteins, fats, oils and carbohydrates." Decoding the regulation-speak, this means the agency won't regulate those substances any more stringently than it does conventionally produced foods. It *would* require more regulatory oversight if genetic modification produced "a ▶

SOUNDBITE

18th Century Man

By Michael W. Lynch

"I write for anybody who's intelligent and who's interested in the subject," University of Alabama historian Forrest McDonald told C-SPAN's Brian Lamb back in 1994. Continuing in the same welcoming spirit, McDonald also offered that he writes in the nude on his porch; a complete transcript of the genuinely engaging interview is available online at www.booknotes.org/transcripts/10046.htm.



Forrest McDonald

McDonald, who jokes that he's spent most of his adult life in the 18th century, is the author of over a dozen books, including a biography of Alexander Hamilton and *The American Presidency: An Intellectual History.* His latest, the eminently readable *States' Rights and the Union: Imperium in Imperio, 1776–1876* (University Press of Kansas), traces states' rights discourse from the Declaration of Independence through the Reconstruction Era.

Shortly after the inauguration of George W. Bush in January, Washington Editor Michael W. Lynch talked to McDonald about the presidency, Bill Clinton's impact on the office, and what we might expect from Bush as the nation's chief executive.

Q: Do you prefer a strong or weak president?
A: On balance, I think a strong president is preferable. There are drawbacks, because of the abuse of power. But Congress is so disposed to passing legislation without giving it much thought that a check against it is necessary. For instance, over the last 10 to 15 years there have been too many new federal crimes created. They make all sorts of things crimes and then they pass these strong mandatory minimum sentences.
Q: Was Bill Clinton a strong president?
A: He was not a strong president; he was a popular one. Ask yourself, what did he get done? Was there any major legislation he was responsible for? Welfare reform came from the Republican Congress. Health care was a disaster. He simply didn't get much done. He was a comedy of errors. Everyone approves of what he's doing, but when you ask the question, no one can say anything he did.

I think the presidency suffered in terms of prestige, and in terms of popular respect for the office, which may work to George W. Bush's advantage. It may make it possible for Bush to be a more effective president. But there's an irony there, because what Bush says he wants is a return to states' rights, local control. So if he's successful, he'll decrease the power of the presidency.
Q: Is there an inherent tension in trying to decentralize federal power, as in Bush's education plan?
A: Yes. He wants to send the authority to make decisions back to the states and to local schools. But the catch is that to get them to do this, you send them federal money. As Frank Sinatra once said on the Johnny Carson show about his connection to the mob, "They are perfectly OK, but don't ever let them do you a favor, because then you owe them." That's the catch in the education package, and it's a terrible one.
Q: You've written that authority has shifted among the three branches of the federal government. Where do you see it trending?
A: The Supreme Court is still ascendant. There are so many emotionally fraught issues that the politicians don't want to settle, and therefore dump on the court. School busing, abortion, and affirmative action, for example.

protein that differs significantly in structure and function, or to modify a carbohydrate, or fat or oil, such that it differs significantly in composition from such substances currently found in the food."

University of Texas Law professor Thomas McGarity, co-author of the CFA report, doesn't think too much of this standard, characterizing the FDA's position as, "So long as you don't insert a gene for a known allergen or snake venom, then it's probably substantially equivalent." But the FDA's current position is simply common sense. If a non-allergenic corn protein shows up in a tomato, so what? People have been eating corn and tomatoes for centuries.

The current system seems to work, too. There is no known case in which a genetically altered food crop that has been approved for sale has caused harm to any person. McGarity, who admits that eating genetically modified foods "hasn't adversely affected me as far as I know," pleads that "we are only urging that the U.S. join the rest of the world in adopting a more precautionary approach." This is a near-open admission that McGarity and the CFA cannot cite any credible scientific evidence that biotech crops have caused harm to human or environmental health.

Fly the Flag—Or Else

By Stephen F. Hayes

New Jersey Democrats may be experiencing a statewide case of buyer's remorse. Before the campaign began in earnest, the party rallied around Woodbridge Mayor Jim McGreevey as their candidate for the 2001 governor's race, elbowing out Sen. Bob Torricelli in the process.

McGreevey's first move as the de facto nominee? He introduced a resolution in Woodbridge mandating that all new businesses in the township fly the American flag. No flag, no business—no questions. "It sends a message to our community and our neighborhoods that we're part of a great nation," McGreevey explained.

Naturally, the proposal elicited hoots of derision from some Woodbridge residents, from state Republicans, and from the American Civil Liberties Union. On January 4, McGreevey, a self-described "flag advocate," showed uncommon resolve for an elected official. As the howls of laughter grew louder, McGreevey restated his position: Fly this symbol of freedom...or else. But later in the day, the flag flap overwhelmed McGreevey. His proposal, you see, had been misinterpreted: The requirement was simply a flag pole, not the American flag.

Alan Westin, a former law professor of McGreevey's, didn't buy the new spin. "You can't take it seriously," he told *The New York Times*. "I mean, an empty flagpole? Am I allowed to fly the Jolly Roger? Can I fly the American flag upside down as a sign of distress?"

Or perhaps a white flag, for surrender? "After rereading my case notes for Constitutional Law 1," McGreevey said in a January 16 statement, "including the First Amendment of the Bill of Rights, I thought it was perhaps more prudent to foster a sense of community through the encouragement of flying the national flag as opposed to requiring it."

McGreevey, who at one point claimed that politics played "zero" role in his flag proposal, waited just two days before making another non-political proposal, this one aimed at milking money from the state's tobacco settlement to pay for mammograms. "This," he explained, "is an immediate crisis in New Jersey." A more immediate crisis, at least for Democrats, might be the McGreevey campaign.

☛ "Long before the end of this century, schools as we know them will no longer exist. Perhaps as early as a decade from now, Americans will no longer be found in pursuit of college degrees, majors, or standardized elementary curricula, but will learn what they wish through a staggering variety of methods and equipment, much of which does not now exist."

—Lanny Friedlander, "Editorial Introduction"

☛ "There's no greater myth than the one that increased schooling is somehow a great social equalizer or leveler. There has probably never been a more powerful instrument for maintaining the class system or power structure in any country than the classrooms."

—John Holt, "Deschooling Society"

☛ "My own feeling is that the compulsory attendance laws are probably much more rigid than they should be and that they're lousy particularly in terms of teenagers. There ought to be a lot more flexibility and more options available."

—"Interview with Christopher Jencks"

Policy Days

In which our man in Washington hears retirement talk, takes in an intentional congressional comedy show, and enjoys a Texas breakfast.

By Michael W. Lynch

Subj: Trolls under a bridge
Date: 2/6/01
From: mwlynch@reason.com

'Tis the season to push policy. With Bush's Cabinet in place and Sen. Ted Kennedy (D-Mass.) enjoying movies with Dubya at the White House, there's a sense that anything is possible.

How about private Social Security accounts? That's the topic at a two-day confab at the Cato Institute. I knew the event was a big deal, as Cato President Ed Crane made it downstairs to the F.A. Hayek Auditorium to deliver the introduction. (I last ran into Crane in September at his annual Salmonfest, where we talked about Bush's electoral prospects and he asked me not to mention his hat, a baseball cap with a salmon grafted onto it.) Social Security privatization has been a rich fishing hole for Cato since its early days, the late 1970s.

HENRY PAYNE

"It's time to move from advocacy to action," said Harvard economist Martin Feldstein, who advised Dubya on Social Security during his campaign and was the morning's featured speaker. Feldstein thinks budget surpluses, which can be used to help fund a transition, make it an excellent time for bipartisan action on the issue. "An investment-based plan makes it possible to maintain current benefits without raising taxes," said Feldstein. "How can any responsible member of Congress reject that?"

Feldstein's main claim is that if current funds were invested in private assets, current benefits could be maintained with only one-third the taxes necessary for the pay-as-we-go system. But he doesn't advocate a purely private system, which he feels would be too risky for many Americans. He proposes a mixed system that devotes 9 percent of payroll to the pay-as-we-go system and 3 percent to individual accounts.

This was too soft for one audience member, but Feldstein disagreed, arguing that a mixed system would minimize both the the market risk of private investment and the risk that taxes will have to skyrocket (or benefits will have to be cut) to meet the system's obligations.

I'd settled into a game of Tetris on my Palm Pilot by the time Charles Rounds of Suffolk University Law School took the podium. Rounds declared that we need to privatize Social Security because the current system is too risky for widows and orphans. Sporting a yellow bow tie, Rounds resembled a coked-up New England prep-school headmaster soliciting alumni donations and, as such, he had my full attention. The trouble with Social Security, he argued, is that we have no property rights in our benefits. "It's absolutely settled law that Social Security is two unrelated schemes," he said, looking ominously over his half-glasses, his index finger wagging. "It's a welfare scheme and a taxation scheme." He assailed defenders of the current system for employing the language of property rights—returns, contributions, and insurance—to mask their evil deeds in propping up this "relic of the Great Depression."

"Trolls have no constitutional protection when it comes to eviction," he said, comparing Social Security recipients to monsters under a bridge. As for the risk of home ownership, which in this case is private sector accounts, at least we can buy insurance, he pointed out, even if the house is made of wood.

Subj: Black ties and white chocolate Capitol domes
Date: 2/7/01
From: mwlynch@reason.com

As I put my tux on for a night on the town, CNBC's Chris Matthews was on TV hammering the Senate's newest limousine liberal, Jon Corzine, for not supporting larger tax cuts. Two hours later, I was confronted by Corzine's mug again, as I stood sipping a vodka tonic awaiting the arrival of my benefactor and friend at the J.W. Marriott Hotel, located two blocks from George W. Bush's new house.

Matthews would soon appear on the scene as well, along with hundreds of others in D.C.'s media and political elite who didn't want to miss the Washington Press Club Foundation's annual Congressional Dinner. I watched Rep. J.C. Watts (R-Okla.), Sen. John Kerry (D-Mass.), C. Boyden Gray (a higher-up in the first Bush administration and a trustee of Reason Foundation, the nonprofit that publishes REASON), and Rep. Jennifer Dunn (R-Wash.), descend

Santa Clara University

The Civil Society Institute

at Santa Clara University

The Civil Society Institute leads students at Santa Clara University in the study of liberty, responsibility, and limited government. College applicants interested in libertarian/conservative ideas should consider Santa Clara University.

The CSI program enhances Santa Clara University's standard course offerings and requirements. CSI provides social support and intellectual guidance for students serious about classical liberal thought. The program includes a weekly reading group, close interaction with CSI faculty, and opportunities to attend special bi-weekly lectures.

Santa Clara University is a private Catholic, Jesuit university located in the heart of Silicon Valley. Its distinguished faculty of teaching scholars offers a rigorous undergraduate curriculum in the arts and sciences, business, and engineering. *U.S. News & World Report* consistently ranks SCU as one of the west's top two regional universities. No other western regional university enjoys higher rates of retention or graduation.

Santa Clara University is the oldest institution of higher learning in California. It boasts a beautiful, mission-style campus, an excellent climate, and easy access to the cities, coasts, and mountains of Northern California.

Left to right: Daniel Klein, David Friedman, Laurence Iannaccone, Henry Demmert, and Fred Foldvary.

To learn more about the Civil Society Institute and Santa Clara University:

CSI Directors: Daniel Klein **dklein@scu.edu**

Laurence Iannaccone **liannaccone@scu.edu**

Civil Society Institute Web site: **www.scu.edu/csi**

Santa Clara University Web site: **www.scu.edu**

to the bottom floor ballroom, to name just a few. Sen. Bill Frist (R-Tenn.), Bush's "eyes and ears in the Senate," sat at the head table, along with House Majority Leader Dick Armey (R-Texas). Brookings' sage Thomas Mann, who was already working the reception when I arrived about 10 minutes after it opened, beat even me to the bar.

The evening isn't as hot a ticket as the White House Correspondents Dinner, but among the gazillions of D.C. black ties, it's pretty good. They must have had at least eight bars, all free-pouring, in the words of one journalist, "top-shelf, make that middle-shelf" booze. And in a room full of windbags, no one made attempts at profundity.

Television commentator and syndicated columnist Mark Shields emceed, choosing for some reason to ridicule the Forbes campaign. He was banking on tapping into an underserved constituency, "the Angry Affluent," Shields told the crowd, identifying Forbes' mantra as "I'm rich as hell, and I'm not going to take it." As for D.C. Democrats trying to survive in the Bush League, he said he's "seen happier people in the back of Jack Kevorkian's van."

The format called for a speech by an elected Republican and Democrat. Rep. David Drier of California dispatched the honors for the GOP. He jabbed Bush, saying he's been president for 17 days and we have yet to hear "Hail to the Chief." "He just thinks Dick Cheney gets enough attention already," Drier reported. He offered two definitions for compassionate conservatism: It believes in using an electric chair with lumbar support, and it hopes to restore power to the states, preferably before nightfall.

Sen. John Breaux of Louisiana was tapped for the Democrats. An emergency caused him to skip out, and Rep. Martin Frost of Texas read his remarks, which is not an ideal way to deliver comedy. He started by dissing former President Clinton, saying it's probably best he didn't attend the dinner since he would have left with the chairs and tables. (One wonders if Breaux would have left that line out, seeing Sen. Hillary Clinton in the audience.) He noted other absences: Neil Bush, who was busy talking to Roger Clinton about how far a brother of the president can really push things, and Vice President Dick Cheney, who was busy babysitting.

The dinner offered three other rarities for D.C. black tie events: The wine kept flowing throughout dinner; dessert was a white chocolate replica of the Capitol dome stuffed with dark chocolate mousse; and the event ended shortly after 10 p.m.

Subj: Sausage, eggs, and school choice
Date: 2/8/01
From: mwlynch@reason.com

"It's time to turn the idea into action," said the National Center for Policy Analysis' policy chairman, Pete DuPont, at the National Press Club's Holman Lounge. Unlike Feldstein a couple days back at Cato, DuPont wasn't talking about private Social Security accounts—although he'd surely give them a thumbs-up—but school choice. NCPA feels so strongly about it that it rushed a book to print in the wake of Bush's victory—*An Education Agenda: Let Parents Choose Their Children's School.* It was the subject of today's conference.

Knowing where to find a hearty breakfast, especially after a night spent at a gala dinner, is critical for a D.C. scribe. NCPA is a Texas-based think tank with a national focus that expresses its regional pride through food. So I was finishing up a plate of scrambled eggs, a sausage patty, a sweet roll, and fresh fruit as DuPont ran through a loose history of school choice. Adam Smith mentioned something about it in *The Wealth of Nations*; so did Tom Paine a decade or so later. Then, said DuPont, skipping ahead, there was Milton Friedman's seminal paper in 1955. Bringing us up to date, he concluded: "In Milwaukee and Cleveland, that's where the voucher movement got its practical start."

Another place that choice, broadly defined, is making real headway is Arizona, where there are 450 charter schools and a tax credit law that will fund up to $20 million in private school scholarships this year. On hand to discuss the Grand Canyon State's experience was Lisa Graham Keegan, who's serving her second term as Arizona's superintendent of public instruction.

Keegan, who would have been secretary of education had John McCain's presidential bid not flamed out, wants to redefine public education as any education that serves the public—which is to say, just about any school. The tax system to finance education ought to be broad and fair, she says. But she also thinks the money ought to "follow the children," regardless of where they choose to attend school.

"I'm very frustrated hearing conversations like the one I'm hearing now at the federal level, that school choice takes money away from public schools," said the animated Keegan, extending her right leg from behind the podium and rocking on her heel. "School choice ought to be a non-negotiable part of public education."

Keegan supports the principles driving Bush's plan. But as a state official, she also knows that education, regardless of what the president does, will still primarily be a creature of state and local governments. And as someone who's been in the trenches for years, she knows that choice has many enemies.

In fact, she identifed one such enemy that may have shocked a few in the audience. The first question was a softball designed to let her rip on the educational establishment. "What's the worst experience from the opposition?" asked an eager man sitting in the front of the room.

Though she easily could have, Keegan didn't tell a tale of evil unions, incompetent teachers, or intransigent school boards. Instead, she said her most difficult challenge came when she tried to reorganize the funding so that it would follow the children equally. "That does not sell in the neighborhoods I grew up in," said Keegan, referring to upscale areas where the schools are good and tax rates actually much lower than the poorer cities. "That is painful for me." Not to mention the kids in the classrooms.

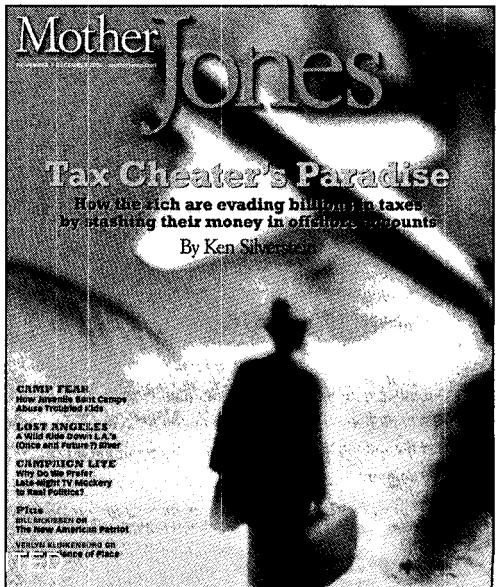
ANYONE CAN BUY OUR MAGAZINE.

(UNLESS YOU'RE A PREDATORY MULTI-NATIONAL NEWS CONGLOMERATE.)

MOTHER JONES

CRAZY PRICE - JUST $10 A YEAR

Here at *Mother Jones* we've earned a reputation for hard-hitting investigative journalism that makes you think. And makes you laugh. Because if we're going to hit you where you live, we'd better maintain a healthy sense of humor. Now you can introduce yourself to *Mother Jones* for the crazy rate of just $10 per year—six chunky, feisty, hard-to-put-down issues for less than the price of a pizza. What are you waiting for? It's risk free: money back if you're not satisfied. **www.motherjones.com**


Mother Jones
Tax Cheater's Paradise
How the rich are evading billions in taxes by stashing their money in offshore accounts
By Ken Silverstein
CAMP FEAR
How Juvenile Boot Camps Abuse Troubled Kids
LOST ANGELES
A Wild Ride Down L.A.'s Civic and Prison Streets
CAMPAIGN LIFE
Why Do We Prefer Late-Night TV Mockery to Real Politics?
Plus
BILL MOYERS on The New American Patriot
VERONA KLINKENBORG on Voice of Place

SUBSCRIBE TO A DIFFERENT POINT OF VIEW. CALL 1-800-GET-MOJO.

Please refer to promotion code A021RM

Cathy Young

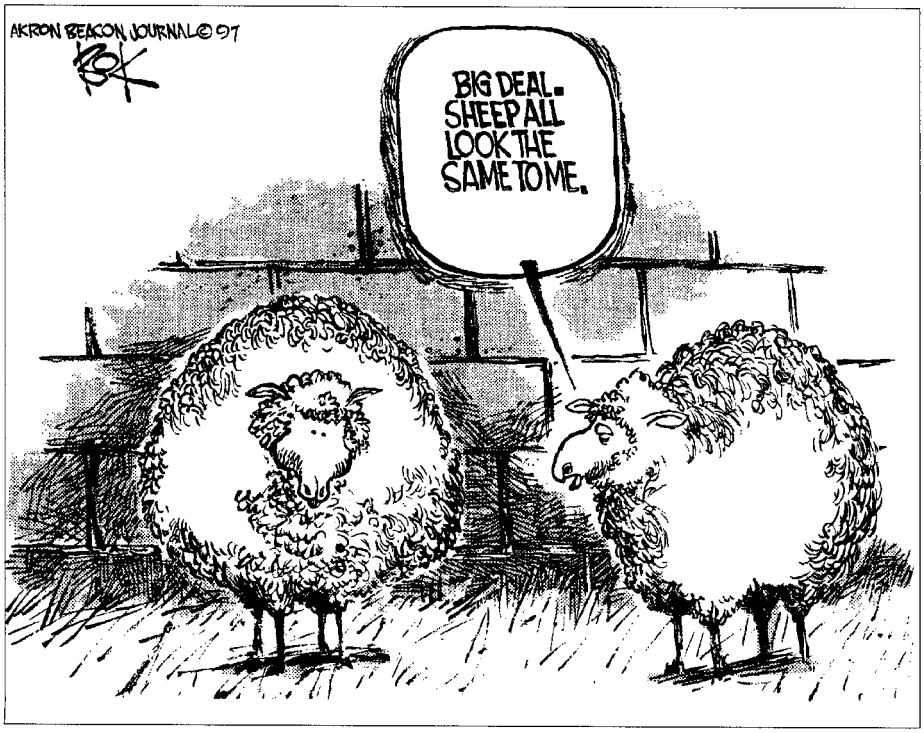
Monkeying Around with the Self

Why support for biotech shouldn't foreclose the debate over its moral issues.

By now, the script is predictable. A new breakthrough in biotechnology, actual or only planned, is announced and breathlessly hyped in the media; pundits left and right respond with variations on the end-of-the-world-as-we-know-it theme; libertarians blast those who would restrict progress in the name of authoritarian moralism and fear. But perhaps no one is entirely right. The shrill, mindless alarmism could inhibit important scientific advances; yet there is danger, too, in cavalier dismissal of moral concerns about how the quest to control our genetic destiny may affect humanity's basic view of itself.

The latest round in this debate was set off by two stories in the first month of 2001: the revelation that scientists at the Oregon Regional Primate Research Center had bred the first genetically altered primate—ANDi ("inserted DNA" spelled backwards), a rhesus monkey with an added jellyfish gene—and the news that an American physiologist and an Italian fertility expert would attempt to clone a human being. "Creeping toward us...is perhaps the gravest imaginable crisis, one that could result in the end of history as a distinctively human, and humane, story," prophesied George Will in a January 21 column. Once genetic engineering is perfected in simians, he warned, human designer babies are next—and ultimately nothing less than "the abolition of humanity."

Just a few years ago, it was the sheep that could mean the end—Dolly the First Cloned Mammal, whose arrival sparked a hysteria-tinged debate riddled with misconceptions about cloning. Some scenarios came straight out of third-rate sci-fi movies: for instance, tyrants with armies of obedient clones. Actually, as psychologist Terrence Hines pointed out in *The Skeptical Inquirer*, clones are not drones, and cloning "would be an astonishingly costly and inefficient way of getting an army." It would make much more sense to grab children born the old-fashioned way and start instilling mindless obedience at an early age, as some real-life tyrants have done.



CHIP BOK

Fantastic visions of clone armies and clone slaves were invoked not only on conspiracy Web sites but in *Time* and *U.S. News & World Report*. In *The New Republic*, University of Chicago bioethicist Leon Kass wrote that "it is not at all clear to what extent a clone will truly be a moral agent," since his autonomy would be subverted by "the very fact of cloning, and of rearing him as a clone"—whatever that means.

If some egomaniac set out to have his cloned child reared so as to reproduce his own personality, or if bereaved parents had their dead child cloned (apparently not an uncommon aspiration, according to an article by Margaret Talbot in the February 4 *New York Times Magazine*) and tried to raise the new child as a copy of the one they lost, it would be a terrible infringement on the child's autonomy. Yet plenty of parents have treated their "natural" offspring as younger versions of themselves or replacements for deceased children; at worst, the fact that the child shares someone else's genetic code might provide an added incentive for the adults to ignore her individual uniqueness.

Of course, as cooler heads like Hines have pointed out, the cloned child would not only have different formative experiences than the "original" but would not even be an exact physiological replica. The donor egg into which the genetic material is inserted still contains its own mitochondrial DNA in its outer membranes; this genetic material will affect the development of the embryo, as will the womb environment. Even identical twins, who do share the same genetic makeup and the same womb, can have very different traits and personalities.

The real ethical problem of cloning, as REASON Science Correspondent Ronald Bailey argues, is that at present, mammals cloned from adult cells appear to be at high risk for congenital abnormalities. It would

www.reason.com

CRAVING ANOTHER ISSUE OF REASON?

Visit REASON Online today. The only cure for post-issue withdrawal.

- **Updated Daily.** Fresh commentary from REASON every day on the latest news in politics, culture, and science
- **Over 2,500 Articles.** The full text of all REASON magazine articles and interviews published since 1994
- **Reason Express.** REASON's feisty weekly e-mail newsletter
- **Breaking Issues.** Your one-stop destination for access to a wealth of resources on hot topics in the news from tax reform to biotech foods to media violence

COMPLETELY FREE! • NO REGISTRATION

A dose of REASON everyday!

www.reason.com

be immoral to expose a human infant to such risks. But if the procedure is perfected in nonhuman mammals to the point of being safe, cloning won't change the basic character of human beings.

"Designer babies" genetically altered for specific traits—the promise of ANDi, the monkey with the jellyfish gene—may pose a different dilemma.

For now, mammalian genetic engineering is at, well, an embryonic stage. The ANDi experiment involved 40 monkey embryos injected with the green fluorescent protein gene, which makes the jellyfish glow in the dark. Only three monkeys were born, and only one of them has the gene in its tissues—but it appears to be inactive, since ANDi doesn't glow. (Rodents implanted with the same gene do, faintly.) Although the human genome has been mapped, scientists are very far from exact knowledge of which genes affect which traits, under what circumstances, and in what combination.

But suppose that at some future point, science did acquire the ability to "customize" a human baby—to produce not only the desired height or eye color but such characteristics as reserve or extroversion, sensitivity or competitiveness, artistic or mathematical gifts. It seems to me that when one considers such a scenario, panic-mongering about the damage to our sense of humanity is harder to dismiss. There is no reason to think that a cloned person will not be a moral agent, but can the same be said of a designer person?

What happens to our notions of self-determination if people become, as the Bolsheviks used to say in a very different context, "human material"? What happens to the belief in individual freedom if individuality can be reduced to a software program written by other people, if an "engineer of human souls" is not just Stalin's chilling term for a writer but an actual job description? What happens if we lose any notion of the human soul, not as a theistic concept but as a notion of some inviolable core of self?

One could argue that genetic engineering would not diminish freedom; human behavior and personality would be shaped by DNA just as it ever was, only more visibly. But it does make a difference whether these characteristics are produced by chance or by human design far more pre-

cise than ordinary sexual selection—just as there is a fundamental difference between teaching your child to be friendly and giving him an extra dose of niceness genes.

There are other disturbing implications. One need not be a radical egalitarian to be troubled by the prospect of a society in which the affluent can add genetic enhancement to their children's advantages while the have-nots fall further behind. Americans accept inequality of outcomes (to the chagrin of intellectuals) because they believe in merit and equality of opportunity. If these concepts become obsolete, a groundswell of resentment won't be long in coming, as well as a major push for the federal government to foot the bill for "Head Start" before birth.

The libertarian argument for genetic enhancement is that parents should be free to choose what's best for the children. Rarely considered is the possibility that some might define "best" in ways that are not only peculiar but ostensibly harmful. I'm not even talking about true weirdos who want Junior to glow in the dark or have pointy Vulcan ears. What about religious fundamentalists who set out to breed submissive females or provide early reparative therapy to embryos carrying the "gay gene"? Or radical feminists who decide to produce sons genetically purged of competitiveness, aggressiveness, and all that other nasty macho stuff?

What's more, we are hardly assured of the triumph of total liberty by the time human genetic engineering techniques are perfected. Aldous Huxley's *Brave New World,* in which the government and not the parents determines each child's genetic programming, does not seem likely. But even in a mostly free society like our own, people may be in for a great deal of coercion to make the "right" decisions about their children's DNA. Suppose genetic intervention can minimize the chances of antisocial behavior, and some parents refused to take advantage of it. If their child goes on to commit a crime, could they be charged with negligence?

None of this is to suggest that research on human genetic engineering ought to be banned or restricted by law, unless it endangers research subjects. For one, gene therapy targeting various diseases could alleviate much human suffer-

Your Tool for Liberty on the Web

www.cato.org

Plug into the world's best on-line resource for advancing the ideas of limited government, individual liberty, free markets, and civil society.

The *Daily Dispatch, Today's Commentary,* and a searchable compendium of 23 years of cutting-edge policy research are just some of the reasons more than 14,000 sponsors make annual tax-deductible gifts to "Washington's hottest think-tank,*" the Cato Institute.

CATO INSTITUTE

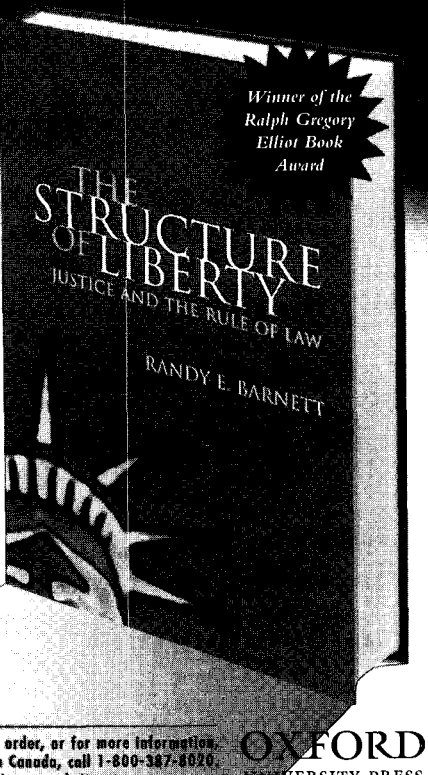
* *Rolling Stone*

Cato Institute, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001

"ENGAGING AND IMPORTANT"*

"This is a serious.... work of jurisprudence and political philosophy....Comprehensive in its treatment, fair-minded in the way it deals with evidence and unfailingly rigorous in its argument." —*Choice.**

"...an insightful, often brilliant presentation that deserves serious attention....This book makes an important contribution toward a more complete understanding of the structure that must underlie a society in which individuals can live in peace and prosperity." —*The Freeman.*



What is liberty, as opposed to license, and why is it so important? Barnett examines the serious social problems that are addressed by liberty, as well as the judicial and legal procedures that distinguish liberty from license. He then skillfully outlines the constitutional framework that is needed to protect this structure of liberty.

1998 (paper 2000) 368 pp. paper $15.95 cloth $29.95

Prices are subject to change and apply only in the US. To order, or for more information, please call 1-800-451-7556. In Canada, call 1-800-387-8020. Visit our website at www.oup.com

OXFORD UNIVERSITY PRESS

CONQUER SPANISH!

It's a battle learning another language. Attack your Spanish with ***Perspectiva*** or ***El Puente***. Vanquish boredom with these linguistic weapons - win the war on fluency with strong vocabulary.

Read Spanish with MORE comprehension and LESS frustration.

- **Spanish** at *YOUR* level - boosts comprehension!
- **Glossary** next to articles - improves vocabulary!
- **Spoken Idioms & Grammar** - increases fluency!

El Puente	*Perspectiva*
High-Beginning Spanish	Intermediate Spanish
$39: 12 monthly issues	$39: 12 monthly issues

SUBSCRIBE TODAY
or call for a **FREE BROCHURE** with sample articles & sample glossary.

EDUCATIONAL NEWS SERVICE
PO BOX 60478 - RES
FLORENCE, MA 01062-0478

www.ednews.com
(800) 600-4494

REASON ONLINE

What happens when the earth's fiercest defender of liberty teams up with the earth's biggest bookstore?

You find your favorite books at huge discounts, shipped fast...and support Reason Online at the same time!

Reason Online has joined forces with Amazon.com, the Web's leading bookseller, to give you the Reason Online Bookstore where you can find:

- every book reviewed in *Reason*
- titles by *Reason* interview subjects
- books by *Reason*'s editors and writers
- editor recommendations

and lots more...You can even share your own favorite titles with other visitors!

So drop by the Reason Online Bookstore today.

www.reason.com/bookstore.html

amazon.com

Prudent Bear Fund

30.47%
Year 2000 Return

Could you use some bear market protection?

For a prospectus and more information call 1-888-PRU-BEAR

The Prudent Bear Fund no load shares total return for the 12 months ending Dec. 31, 2000 was 30.47%, and its 5 year and average annual return since inception (Dec. 29, 1995) through Dec. 31, 2000 was -11.43%. Performance data quoted represents past performance, which is no guarantee of figure results. You should realize that investment return and principal value will fluctuate so that shares, when redeemed, may be worth more or less than their original cost. The prospectus contains more complete information, including fees and expenses. Please read it carefully before you invest.

www.prudentbear.com

ing. If it can make significant inroads against Alzheimer's, for instance, then millions will be saved from the cruelest loss of individuality and identity. This is a potential that biotechnology foes brush aside in a high-handed manner that borders on offensive. Columnist George Will mocks the "desiccated utilitarianism" which holds that "if something reduces an individual's suffering or improves an individual's well-being, it should be done." Going much further, in a *Slate* exchange last year, *GreenMagazine.com* editor Ken Kurson derided the human genome project as "a despicable profit grab based on a demonstrably false premise (that there are too few people, and that people should live longer)."

But those who argue the other side sometimes have their own blind spots: In their optimism, they tend to forget that even beneficial changes can have a downside and that life can confront us with tragic paradox. Moreover, opposition to government bans on morally problematic uses of biotechnology should not foreclose a vigorous debate about moral issues—or a voluntary decision by scientists not to go down certain paths. The abdication of moral judgment invites intrusive laws. There should be, at least, a stigma against any genetic alteration that amounts to monkeying around with the self.

It may well be, of course, that science may well never gain the knowledge and skill required to truly engineer the soul—that, as University of Delaware particle physicist Stephen Barr writes in *First Things*, the interaction of various genes that may produce a particular trait is too complex ever to master. Perhaps genetic manipulation will at most increase the chances that a child will possess a desired characteristic, and fears about the "abolition of humanity" will prove groundless. But then, those who stress the perils of the unfettered pursuit of knowledge may have something of a last laugh. The grounds for optimism, after all, are in the hope that there are limits to this Promethean quest. ◆

Contributing Editor Cathy Young (CathyYoung2@cs.com) is the author of Ceasefire! Why Men and Women Must Join Forces to Achieve True Equality *(The Free Press).*

In God We Trust

The right wants to do to faith-based charity what the left has done to culture.

By Charles Paul Freund

George W. Bush's initiative to give federal money to faith-based organizations has drawn criticism in many tongues. Progressives are concerned about the separation of churches from a state that may play religious favorites; left-leaning churchmen are worried that Washington will muffle their calls for social justice; libertarians predict that charity's voluntary essence will be undermined by federal pottage.

Given that the history of religion as a politicized force can be encompassed under these same problematic headings of state establishment, censorship, and corruption, it's plainly a good idea to pay heed to such latter-day Jeremiahs. To join faith to taxes more intimately than is now the case is to matchmake a marriage you wouldn't want next door.

In fact, we already have such a noisy union to deal with. What conservatives want to do to religious altruism, a matter of fundamental meaning to them, is not unlike what liberals have already done to one of their own favorite enterprises: culture-making. Yet the liberal project of joining state largess to culture has hardly been a success. It has proved baneful, but not because of any predictable issues of federal power. The state has not attempted to impose its taste on the populace, or necessarily tried to subvert or censor anyone (though some cases may be arguable). Given the small amounts of money involved, it hasn't even overtaxed anyone on culture's behalf. Rather, the effect of joining culture and taxes has been to distort culture's social role, and ultimately to belittle its stature.

Why has the state proved such a lousy arts patron? Because it suffers the liberal democratic delusion that it can do good while avoiding risk. Champions of state support for culture understand the arts as an ennobling, uplifting enterprise. Assemble persons of appropriate taste to parcel out tax money to deserving creators, they argue, and the general result will be a benefit to all. Art, in other words, is good for us.

If conservatives seek to distort and belittle the social role of religious altruism, then opening the federal treasury to churches is a promising beginning.

In fact, much state support for the arts is not especially controversial. But some is, and that's where all the public attention is directed. Urinate on stage under an arts grant, use tax money to hang photographs of gentlemen with bullwhips in their anuses, or display likenesses of sacred figures fashioned from elephant shit, and you are likely to make the papers, offend people whose money you are using, and get the attention of opportunistic politicians.

As a result, the art world has become best known for its most risky, most cynical, or most marginal work, because that is the source of all the shouting over public support. Enlightenment thus gives way to contempt; patronage becomes timid as cultural bureaucrats seek to avoid headaches; the safe and the mediocre thrive. If anyone set out to undermine the culture-making enterprise, they could hardly have come up with a better system than to join art financially to a republic whose cultural role is otherwise limited to a guarantee of free speech.

The state is no better prepared to act as religious benefactor than it has been to act as cultural patron, and for the same liberal democratic delusion. Champions of federal support for faith-based organizations understand the effort as an enterprise that succeeds in doing good, often where secular efforts fail.

But just as art is not necessarily about enlightenment, faith is not necessarily about good works. Faith is about saving souls, about winning men and women to an ineffable truth, to say nothing of subverting the heretical competition, much less filling the offering basket. Moreover, if the art world is dense with poseurs, provocateurs, and cynics, the world of religion is even denser. The dynamics that lead from controversy to nervous philanthropy are already in place. If conservatives seek to distort and belittle the social role of religious altruism, then opening the federal treasury to churches is a promising beginning.

In making his congregational proposal in January, Bush surrounded himself with numerous religious leaders whom he said were doing fine civic work on a voluntary basis. No doubt he was right about these figures, no doubt there are many more like them, and no doubt that volunteerism is a more efficacious approach to social problems than welfare statism. The president should sign a personal check in support of his favored church charities, and encourage the citizenry to follow his example voluntarily. Placing taxes in pursuit of souls, as he is doing, is a favor neither to those taxed, nor necessarily to those saved.

Charles Paul Freund (cpf@reason.com) is a REASON *senior editor.*

TITLE IX'S

PYRRHIC VICTORY

How the quest for "gender equity" is killing men's athletic programs

Former National Wrestling Champion Stephen Neal is grappling with his toughest opponent yet. The 6-foot-5-inch 270-pounder racked up numerous awards during his four-year wrestling career at California State University at Bakersfield (CSUB): He was a four-time All American and an Academic All American, and he took home the Heisman Trophy of wrestling, the Dan Hodge Award. Yet the heavyweight, who graduated in 1999, burns for one more win—not on a wrestling mat but in a court of law.

DARREN GYGI

BY MICHAEL W. LYNCH

Neal's longest match started in 1996, when officials at CSUB announced plans to cut the wrestling team. It's not that the team wasn't performing. The only Division I sport at CSUB, the program had distinguished itself over the years, winning two PAC 10 championships and finishing in the top 10 in the NCAA finals three out of the previous four years. The problem had to do with "gender equity," the proportion of male to female athletes. Critics charged that CSUB, like many other colleges and universities, had too many men playing sports and was discriminating against women.

In 1993, when Neal was a junior wrestling at a San Diego high school, the California chapter of the National Organization for Women (CAL-NOW) was completing litigation against the California State University System, of which CSUB is a part. CAL-NOW claimed that the Cal State System discriminated against women in its athletics programs. A state superior court judge crafted a consent decree that gave individual CSU campuses five years to bring the gender breakdown of their student athletes and scholarships to within five percentage points of the breakdown in the student body. If a school's student body consisted of 55 percent women, then at least 50 percent of intercollegiate athletes needed to be women. On the financial front, total expenditures for men's and women's programs were to be within 10 percentage points of each other.

The intent of Title IX was to provide and women, but today it is often applied but kill athletic opportunities

When he learned of the consent decree, CSUB wrestling coach T.J. Kerr knew he had a problem. CSUB's student body is dominated by women, 63 percent. And even though the school had seven women's teams and only six men's teams, men accounted for 61 percent of its varsity athletes. Kerr studied the issue and developed a plan, figuring that the way to comply with the court order was to expand opportunities. He took the initiative to start a women's wrestling team. "I started looking at the participation number of women wrestlers in high school—it had doubled over five years," says Kerr. "I was thinking if I could get women on my team, I could leverage this thing." School administrators denied his request for women's wrestling, but Kerr went around them and started it as a club sport. Soon he had 17 women on his team. Two even competed for the varsity squad.

The cuts came anyway. In late 1995, CSUB's athletic director capped Kerr's squad at 27 men, and the coach was forced to cut 10 male athletes. Five former wrestlers filed grievances with the school, alleging sex discrimination. Then Kerr was told he could carry a total of only 34 wrestlers, forcing him to cut seven women. In 1996, on the eve of the PAC 10 finals and the Division I championships, the Intercollegiate Athletics Advisory Committee, which advises CSUB's president on athletic policy, announced plans to cut the wrestling program to meet the consent decree.

Enough was enough, thought Stephen Neal, who'd experienced the damage on a personal level: His roommate, a freshman walk-on, was cut from the squad. "He didn't know what to do. He was in shock," says Neal, adding that the roommate ultimately quit school. Neal, along with 21 male wrestlers and eight female ones, filed suit against CSUB in the U.S. District Court for the Eastern District of California for sex discrimination.

The root of Neal's problem—and that of thousands of male athletes across the country—lies in the widespread push for gender equity in scholastic and collegiate sports. In California, Neal and hundreds of other male athletes have been affected by state law. Elsewhere, it's a federal law that's at issue: Title IX of the 1972 Amendments to the Education Act. Title IX sought to give women equal access to educational programs, including athletics. Now it's evicting men from the locker room.

Struck Out

There's no arguing that women didn't face a shortage of athletic opportunities in the 1950s, '60s, and early '70s. A year before Title IX's passage, only 294,015 girls played high school sports, compared to 3.7 million boys. "I was the classic tomboy growing up in middle America who played football, basketball, and baseball with my brothers and the neighborhood guys," recalls 50-year-old Mary Jo Kane, who teaches sports sociology at the University of Minnesota and directs the Tucker Center for Research on Women and Girls in Sport. "I lived to play those sports. But when I got to high school, there weren't teams available for me in those sports. So I did what a lot of girls in my generation did and started playing

a more 'appropriate' sport, golf."

In the three decades since Title IX's passage, women's participation in school athletics has increased impressively. During the 1999–2000 school year, 2.7 million girls played high school sports, compared to 3.8 million boys, according to the National Federation of State High School Associations. In 1998–99, 148,803 women played NCAA sports, up from 80,040 16 years earlier.

"In one generation, young girls have gone from hoping there is a team to hoping they can make the team. That's an incredible difference," says Kane, who credits Title IX and the hard work of women's sports activists for this change—and who jokingly declares that she's never been a communist and still loves football. Women can now earn a living playing basketball in America. In 1999, the U.S. women's soccer team filled the Rose Bowl and captivated the country, beating China for a World Cup victory.

opportunity for girls in ways that do nothing for boys and men.

Still, Kane is frustrated with the pace of change. "Only 9 percent of Division I schools are in compliance," she says. "And that's 30 years after passage." Women still account for only about 35 percent of college athletes and garner less than a quarter of annual athletic operating and recruiting budgets.

Yet while the intent of Title IX was to provide opportunity for girls and women, today it is often applied in ways that do nothing but kill athletic opportunities for boys and men, an outcome no one claims to want. In the gender equity debate, few people blame Title IX itself, which, after all, seeks only to ensure equal opportunity for both men and women. Most women's sports advocates recognize there's a problem with cutting men's teams to equalize participation rates. But they blame the choices made by administrators who they say refused to restrain football programs. For their part, male coaches and athletes say they agree with the spirit behind Title IX. It's the rules promulgated by bureaucrats dictating hard gender-based quotas that are the problem.

Rhode Island's Providence College provides a vivid example of how Title IX often plays out. In the late '90s, Providence found itself in a familiar bind. Women accounted for 59 percent of its students, yet they were only 43 percent of student athletes. The school was facing a peer review by the NCAA, and it needed to show quick "progress" toward gender equity. Providence simply had too many male athletes, and the easiest course of action was to cut some men's programs to bring its numbers into line. In the fall of 1998, the administration announced that the 1999 season would be the last for the school's 78-year-old baseball team. After 2002, Providence would no longer support men's golf or tennis. Not one new women's team would be created, but the male-female ratio would still be greatly improved.

"Baseball, tennis, and golf were the three sports that, when you combine their resources together, delete them from the male side of the picture, [and] add those resources to the women's side of the picture, put...us in compliance with Title IX's proportionality mandate," explained Providence Athletic Director John Marinatto to the PBS special *National Desk*. School administrators had watched neighboring Brown University get sued and lose for not having its numbers right; they feared a similar lawsuit. "We just couldn't risk that kind of litigation," the Rev. Terence J. Keegan, Providence's executive vice president, told *The New York Times*. "We felt we were backed into a corner."

"I was trying to figure out if it was a dream or not," recalls former Providence baseball coach Charlie Hickey, who started as an assistant in 1991 and took over the program in 1996. "A lot of wild thoughts came to mind, a lot of hatred, bitterness. Then I had to tell 29 kids."

Providence outfielder Jason Hairston recalls the October day when the coach interrupted practice to deliver the news. "It was like someone had taken your heart out of you," he says. Hairston had good reason to be upset. Like others on the squad, he had chosen Providence because of its baseball team. As a high school senior in Connecticut, he'd made all-state teams in soccer and baseball and was heavily recruited in both sports by such schools as the Naval Academy, West Point, and Boston College. He decided to pursue his options in baseball because he found it more challenging. "People say I was better at soccer," says Hairston. "But I played baseball for the love of the game." He chose Providence because he liked its atmosphere, its location, its academic reputation, its standing in the prestigious Big East sports conference, and the relative largess of its scholarship offer.

The unexpected demise of Providence's baseball team forced Hairston to make a tough decision. He'd already completed two years of academics at Providence. If he played his junior year at Providence, the team's last season, it was unlikely that he'd be able to transfer and play his last year of eligibility at another school. Even if he was able to play his final year of eligibility, it would cost him academically. Most schools will not accept three years of academic work, so transferring would delay his graduation for at least a year. Hairston decided to stay and play at Providence. It's a decision he doesn't regret but one that came at a steep price for a young man who planned to play four years of Division I baseball, with the goal of getting drafted into the pros. "It made me give up my

dream," says Hairston, who graduated last year and now works for KPMG Consulting. "I could have worked here, played Division I baseball, and showcased myself. Now I can't."

The same qualities that convinced Hairston to choose Providence—the school's size, familial atmosphere, and Big East schedule—were helping Coach Hickey produce the best baseball teams in Providence College's history. In 1995 and 1996 the team was the Big East season champion. Hairston's dream of playing Major League Baseball was hardly a pie in the sky. Two of Providence's recent graduates have made it, if only briefly, to the big leagues. Six or seven Providence alumni are sprinkled through the minor leagues.

The Biggest Quota

Title IX itself says nothing about athletics. It simply prohibits discrimination based on sex in federally funded education programs. "No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance," states the relevant part of the law.

Title IX also says nothing about quotas based on population proportions. In fact, the law's creators emphatically argued against such things. "The thrust of the amendment is to do away with every quota," explained its chief Senate sponsor, Birch Bayh (D-Ind.). House sponsor Albert Quie (R-Minn.) similarly underscored that Title IX "would provide that there shall be no quotas in the sex anti-discrimination title."

"When the announcement was baseball" at Providence College, "the women athletes were as mad

Despite such intentions, Title IX has become, in the approving words of Rep. Maxine Waters (D-Calif.), "the biggest quota you've ever seen." Speaking at a 1997 House Constitution Subcommittee hearing, Waters emphasized that point, calling Title IX, "a quota—[a] big, round quota."

What happened? In 1979, following standard operating procedure, the federal Department of Health, Education, and Welfare issued a policy interpretation for athletics. Schools would be in compliance with Title IX, HEW decreed, if they met any one prong of a three-prong test: They could provide sporting opportunities to the sexes in "numbers substantially proportionate to their respective enrollments"; they could show a "history of continuing program expansion"; or they could show they were already meeting the "interests and abilities" of women.

In the 1990s, federal courts elevated this interpretation to the level of law. At the same time, they focused on the proportionality test as the only definitive means to prove compliance. A 1992 court decision further established that plaintiffs could collect attorney's fees and damages, which substantially raised the stakes for colleges and universities. Once compensatory and punitive damages could be awarded in Title IX cases, the lawsuits effectively became self-financing. Even when damages aren't awarded, public interest attorneys can bill the court at several times their actual costs. In fact, enterprising lawyers don't even need aggrieved plaintiffs; suits can be filed by anyone based on aggregate numerical disparities.

In 1996 Norma Cantu, assistant secretary for civil rights at the Department of Education, made it clear that while a school could theoretically meet Title IX requirements in any one of the three ways outlined by HEW, the only true "safe harbor" for a school was to offer "proportional opportunity." At the same time, Cantu redefined *opportunity* to mean the number of women playing sports, not the number of spots available on a school's teams. On this reading, explains Mark Martel, attorney for former CSUB wrestler Stephen Neal, "an *opportunity* equals an actual participant. So if a woman's team could have had 25 athletes but only 20 go out for the team, there are only 20 opportunities. If a men's team has 25 opportunities and 25 men go out, then there is unequal opportunity."

In short, what happened to Title IX is a classic Washington story. Ideological activists take words that appeal to a general sense of fair play, such as *opportunity*, and then redefine them. While they argue for their new definition in court, they simultaneously justify their actions to the public based on the old, common-sense understanding.

The redefinition of opportunity turns out to be critical to the new wave of Title IX enforcement, because men

go out for sports in greater numbers than women do. Women's sports activists claim that in the absence of discrimination, women would play sports in equal numbers to men. "You treat sports the same way, and girls are just as interested in playing as boys," Donna Lopiano, executive director of the Women's Sports Foundation, told ABC's John Stossel on *20/20* in 1998. She said there was "no doubt in [her] mind" that discrimination is the reason girls and boys don't play in equal number. "If you build it," she told Stossel, "they will come."

There's some evidence for Lopiano's claim. Recall that in 1970 12 boys played high school sports for every girl. As the number of girls' teams grew, so did the number of female participants. In 1970 just one out of every 27 high school girls played varsity sports, according to Lopiano. Today that figure is about one in three. If women with athletic aspirations had simply accepted the status quo in the 1960s, we'd likely think the 12-to-1 disparity was "natural," simply the result of girls' preferences. Yet over the past three decades, millions of girls have filled up soccer fields, softball diamonds, lacrosse fields, and basketball courts.

Paying for Parity

Yet there is ample reason to believe that there is more to gender disparity in college sports than lack of opportunity—however that term is defined. If Lopiano is right,

made about eliminating said one female swimmer, about it as anyone else."

compliance with Title IX shouldn't be too difficult for schools: All they would have to do is offer the same number of teams for women, and the problem would go away. But this doesn't always work. Schools have indeed built sports opportunities for girls, but boys continue to turn out in greater numbers. Hence, as of 1998–99, there are more male college athletes (211,273 men vs. 148,803 women, according to the NCAA), even though there are more female teams (8,374 women's vs. 8,004 men's). In other words, women have more chances to play sports, but they don't take advantage of them as often. College-level intramural sports, which are purely voluntary, are dominated by men, with nearly eight in 10 athletes being male, according to a 1994 study by consulting firm Pacey Economics.

What might explain those numbers, if not discrimination? "Girls are interested in more things," says Kimberly Schuld, who works on gender equity issues for the Independent Women's Forum, a conservative, D.C.-based organization that is critical of Title IX. "They are more likely than boys to participate in multiple extracurricular activities, not just sports. If we applied a gender quota to other activities, it would destroy opportunities for girls in fields such as journalism, law, and science. Who would stand for that?"

Coaches and other investigators also challenge the idea that discrimination is at the root of numerical disparities. "Interest in sports has gone up tremendously among women," says Janet Sherman, head coach of the women's softball team at California State University at Northridge. "But is it as high as on the men's side? I don't think so."

"There's no question in my mind that women are less interested in playing sports than men," says Lamar Daniel, a former investigator at the Department of Education's Office for Civil Rights who conducted the very first Title IX investigation, back in 1978. Daniel went on to conduct over 20 reviews before retiring in 1995 to become a consultant. "But logically, in my experience, you can't prove that," he adds. "It's just not provable." In practice, Daniel says, this means schools must seek proportionality, either by adding women athletes, cutting or capping men's teams, or doing a little of both.

The University of Louisville opted for that last option. In 1997 the school brought in Daniel as a consultant to review its sports program. The new athletic director, Tom Jurich, had been forced to deal with the aftermath of a Title IX investigation at Colorado State, and he knew Louisville was legally vulnerable. At that time, women accounted for 52 percent of its students but only 33 percent of its athletes.

Jurich wanted Louisville to enjoy the safe harbor of proportionality, but he didn't want to have to cut men's teams to get there. He planned to build Louisville's program into compliance. He added three women's teams (softball, rowing, and golf) while cutting one men's team (indoor track). He went into a fund-raising frenzy to reach his goal.

In the early 1990s, Louisville built a new $70 million football stadium and made its first-class training facilities available to all student athletes. In 1998 it refurbished the old football facility to accommodate baseball, women's field hockey, rowing, and men's and women's golf. It spent $13 million building Cardinal Park, which houses a new softball stadium, a track and field stadium, and a soccer field for both men and women. Jurich is currently raising money for a new $18 million swimming facility that he expects to complete in 2002.

The price tag for such efforts is not small: Louisville's sports program costs about $25 million annually. (Since 1983, it has paid for itself through gate receipts, TV contracts, and fund-raising.) But such efforts paid off in terms of proportionality. By fall 1999, Louisville had

increased its women's sports participation to 45 percent; there are now a total of 200 female and 245 male athletes. It expects to achieve parity within three years.

Washington State University took a different, though equally successful, route to proportionality. In the early 1990s, the state legislature passed a bill providing tuition waivers for female athletes, which allowed its state-supported colleges and universities to beef up their squads for less direct money. "Washington State is at parity, and the University of Washington is close," says the Independent Women's Forum's Schuld, who points out that this option shifts costs to taxpayers and is unavailable for private schools.

Proportionality can be achieved, as Louisville and Washington State demonstrate. But they are the exception: Most schools can't fund expansions through massive fund-raising campaigns or use state-granted tuition waivers. For the great majority of schools, being safe from a Title IX investigation or private lawsuit means cutting men's programs.

"This whole issue can b policy," says one Title IX critic. "I it can be undone by policy."

Swimming Upstream

While no one denies that many men's programs have been cut in the pursuit of gender parity, there's disagreement about the overall numbers. On the high end, Leo Kocher, the University of Chicago's wrestling coach, says there have been massive cuts. Analyzing one set of NCAA numbers (the group is notoriously slow to release easy-to-use data related to Title IX issues), Kocher claims that between 1992 and 1997 more than 200 men's teams were cut, a loss of more than 20,000 men's roster spots. Only 5,800 women's spots were added, for a male-pain-to-female-gain ratio of 3.4 to 1. Donna Lopiano disputes Kocher's tally. She points to other NCAA data which show that total men's sports participation in the NCAA has actually increased by more than 13,000 in recent years. The problem with this is that new schools were added to the NCAA over the period, so overall numbers could go up even if many schools were cutting men's teams.

The General Accounting Office took a crack at the issue in 1999. In an attempt to hold the pool of schools constant, it found that from the 1985–86 academic year to the 1996–97 academic year 21,000 male athletic spots disappeared, a 12 percent drop overall. On the female side, 14,500 spots appeared, for a jump of 16 percent.

Regardless of the exact numbers, it's clear that men's programs get dropped on a regular basis. This is especially true for teams that generate little revenue and small crowds. In 1999, for instance, Miami University of Ohio announced it was cutting its wrestling, men's soccer, and men's tennis teams to comply with Title IX. That same year the University of New Mexico shut down wrestling, men's gymnastics, and men's swimming. Brigham Young University axed wrestling and men's gymnastics. In 2000 the University of Miami announced plans to cut its award-winning men's swimming and diving programs as well as men's crew. Wrestling, track, cross-country, swimming, and tennis have been hit particularly hard, each losing more than 20 programs in the past seven years. With the possible exception of basketball, every men's sport is vulnerable.

Even programs that can fund themselves through alumni donations aren't safe. Winning traditions similarly count for little. In 1994 UCLA cut men's swimming and gymnastics, programs that consistently produced Olympic medalists. In exchange, it added women's soccer and water polo.

"I think it's great that the women have those two sports," says former UCLA swimming coach Ron Ballatore. "It's too bad they had to drop two great men's sports. It's a terrible blow. Here's a place that has had swimming since the 1920s. It was one of the top programs in the country. It would be like Notre Dame or Nebraska cutting its football team." In the 16 years Ballatore coached UCLA, the school produced 26 NCAA champions and 10 Olympic gold medalists. It won the NCAA championship in 1982 and finished out of the top five just a handful of times. The only season it finished out of the top 10 was its last, lame-duck season.

Ballatore's swimmers fought hard to save the program. With the exception of one swimmer, his entire team elected to swim the 1994 season and work to save the team instead of transferring. "The day it happened, Coach Ballatore called me and gave me the choice of transferring right there or coming back for another year and

trying to fight," recalls backstroker Michael Andrews. "I decided to stay and fight."

The swimmers raised money from alumni. They filed a lawsuit. In the end, though, nothing helped. "It didn't matter about success or the fact that your program was good," says Ballatore, who went on to coach at Brown and then the University of Florida, where he is currently an administrator. "It boiled down to money and Title IX. But money really wasn't an issue. We had raised enough money. We had an alumnus who was going to give us a bunch of money."

UCLA's gymnasts were cut loose as well, although they stayed on to train at the school's facility. Peter Vidmar, a UCLA alumnus who won two gold medals and a silver

:olved by rewriting

Was created by policy,

in the 1984 Olympics, says the school's chancellor told him it was due to Title IX. Jim Foody, who had hoped to make the 2000 Olympic team, is blunt. "In 1984 we had half the men's Olympic team," he told *The Daily Bruin.* "In 1992 we had the No. 1 and No. 2 ranked guys....For them to drop that team after what they did for the school, it's definitely shitty."

Even these cuts didn't protect UCLA from charges of discrimination. In December 1998 CAL-NOW filed a Title IX complaint with the federal Office for Civil Rights, which is still under investigation. Betsy Stephenson, associate athletic director and senior women's administrator, told *The Daily Bruin,* "I would hope that we wouldn't have gotten this complaint because I don't believe women athletes are being mistreated, but we can't control complaints from coming." Says Ballatore, "UCLA got rid of us, but they are still faced with the same problem."

Title IX vs. Quotas

The tragedy of Title IX is that virtually nobody is pleased with its current results. The day after Providence announced it was killing its baseball team, the college gym filled up with angry students trying to make sense of what had happened. The women's soccer team threatened to boycott their game that day in solidarity with their fellow athletes. The girl's volleyball team warmed up in the baseball team's jerseys. Alexa Ricardo, a senior soccer player recalls that nobody agreed with axing baseball and nobody thought it was necessary. Swimmer Michelle Hackmer told *The New York Times*: "When the announcement was made about eliminating baseball, the women athletes were as mad about it as anyone else ....Sure we want women athletes to be treated fairly, but at this expense? I don't think this is what Title IX was supposed to be about."

Hackmer is right. Without policy changes, Title IX is likely to keep killing men's teams. The Independent Women's Forum and other critics hope that the Bush administration will return to the original intention of the provision. Since the problem is with the bureaucratic regulations and enforcement policies, not the statute itself, they are optimistic about the prospects for change. "I think [Bush] will have a huge effect," enthuses the IWF's Schuld, who notes that a clause concerning Title IX made it into the 2000 Republican platform. "This whole issue can be solved in 12 months by rewriting policy. It was created by policy, it can be undone by policy."

That's a rosy scenario. While the Bush administration may reinterpret Title IX, it will face staunch opposition from the industry that has grown up around the college sports issue. There's no reason to believe that groups invested in Title IX lawsuits will simply admit defeat and leave the legal playing field. Consider Deborah Brake, an attorney with the National Women's Law Center. Brake believes that the only problem with Title IX is that it hasn't been enforced comprehensively enough. She once told a reporter she'd like "to bring immediate law suits against as many universities as possible to force them to comply with the law." In June 1997 Brake's group filed 25 complaints with the Office for Civil Rights to celebrate the 25th anniversary of Title IX's passage and hasn't slowed down since.

In the meantime, Stephen Neal, the wrestler from California State University at Bakersfield, continues his own legal grudge match against Title IX. The law, he says, shouldn't have to hurt men to help women. In fact, he thinks cutting men's teams simply to get to proportional numbers—to meet a quota—is expressly forbidden by Title IX, which is about ending real, not just statistical, discrimination.

Neal is attempting a bit of legal jujitsu: He's using the text of Title IX to argue against the CAL-NOW consent decree. In February 1999 U.S. District Court Judge Robert E. Coyle agreed with Neal and enjoined CSUB from further cutting the men's wrestling team. But Neal lost round two in December 1999, when a three-judge panel of the U.S. Court of Appeals for the 9th Circuit reversed the injunction. Neal, who sees the larger context of his struggle, will be back in federal court in February, pressing his case.

"We feel we are the last stand for wrestling," says Neal. "We're going to keep fighting." ◆

Michael W. Lynch (mwlynch@reason.com) is REASON*'s Washington editor.*

SEX, Economics & OTHER Legal Matters

Judge and scholar Richard A. Posner speaks out on the Clinton impeachment, the Microsoft case, and nude dancing.

Interviewed by Steve Kurtz

Richard A. Posner might be the most important and influential legal thinker alive. A professor at the University of Chicago Law School since 1969 and a judge on the U.S. Court of Appeals for the 7th Circuit since 1981, he is the author or co-author of more than two dozen books, including *Economic Analysis of Law* (1973), which helped pioneer the thriving field of law and economics. He has also written hundreds of articles and book reviews, as well as some 1,800 judicial opinions. While economics informs his thinking, Posner is hardly a one-trick pony: He has addressed topics as diverse as cloning, rhetoric, Kafka, citation style, AIDS, euthanasia, literary theory, advertising, and ancient Greece; it's almost easier to list subjects he hasn't discussed.

GALIA LERECH

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

As widely esteemed as Posner is, he has also been widely attacked. Conservatives have questioned what they see as his moral relativism, as well as his skepticism that simple deductive legal analysis can lead to the "right" judicial ruling. The left objects to his attack on moral philosophy and his claim that there has been too much emphasis in the law on free-floating standards such as "fairness" and "social justice." And many on all sides have been troubled by his seemingly cold-blooded economic approach to human interaction, including examinations of rape, abortion, and the selling of babies.

While Posner had been a well-known and controversial figure in legal circles for three decades, in 1999 his notoriety spread further: He published a book about the Clinton impeachment, *An Affair of State,* that caused a stir, and he was named mediator in the Microsoft antitrust case (although the negotiations ultimately fell apart). Suddenly he was an A-list legal celebrity, profiled in newspapers and magazines across the nation.

I got to know Posner while attending the University of Chicago Law School, where I took his classes on the legislative process and law and literature. Whenever I'm passing through town, we meet for lunch. Considering how strongly worded his opinions can be, in person he is surprisingly soft-spoken, with a gentle good humor. His conversation, as might be expected, is wide-ranging: He may talk about the limits of federal jurisdiction at one moment and his love of the little-seen comedy *8 Heads in a Duffel Bag* the next. And as busy as he must be, he is a host who never gives you the feeling that he's in a rush.

Oscar Wilde once said of George Bernard Shaw that "he hasn't an enemy in the world, and none of his friends like him." Posner is the opposite: Plenty of people strongly disagree with his writings, but he's such a genial, hardworking person that even his enemies can't help but admire him.

Reason: You came to the University of Chicago in the late 1960s. What were the turning points, occurring around that time, that shaped the emerging field of law and economics?

Richard A. Posner: I think the basic developments were earlier. They really go back to the '50s. As sophisticated economics became trained on antitrust issues, and as antitrust became an important field of law, lawyers began to notice that there was a body of economic work that had a lot to do with law. But the impact was mainly in the antitrust field and closely related fields like public utility and common-carrier regulation. Then Ronald Coase published his article on social cost in 1960, and about the same time Guido Calabresi published his first article on tort law. These were two articles applying economics to the common law as far as it had been to the antitrust domain. Now people began to realize that economics might have a broader scope. When I started teaching in 1968, I had actually been working on antitrust cases; I was an economics fan. I discovered there was this economics of tort law as well, and it began to seem that economics had a broad applicability to law.

Another thing that is important here is the general deregulation movement, which made microeconomics seem more important to public policy because of the criticisms of the regulatory schemes: regulation of airlines and other forms of transportation, financial institutions, communications, and so on. Criticisms were pitched on microeconomic grounds, so people became more familiar with concepts of marginal cost, monopoly, barriers to entry, and so on. So the antitrust economics, the expansion of economic thinking into other areas of law, and the deregulation movement made lawyers very sensitive to economic criticisms of law.

Reason: You were born in 1939 in New York City. Your father was a lawyer and your mother, you've said, was fairly left-wing.

Posner: Yeah, she was a public school teacher. She was very left-wing.

Reason: And you knew the Rosenberg kids when you were growing up.

Posner: Only slightly. But shortly after their parents were executed, their adoptive parents, whom my parents knew, brought these kids to my house. I don't know quite how the idea originated, but my mother asked me whether it would be all right to give these unfortunate children my electric train. And I said fine, because I had outgrown electric trains. I was already 13 or 14. I mention this because there was once an article about me—this is really weird—claiming that the reason I became conservative was a deep resentment that my

mother had taken my electric trains and given them to these spies' children. (Laughter.)

Reason: When you came to Chicago, I suppose you had already known or heard of people like Ronald Coase, Milton Friedman, Gary Becker, and Aaron Director.

Posner: Aaron Director had retired. He was living near Stanford and had an office in the Stanford Law School. I recognized the name when I started teaching at Stanford in 1968, and I went into his office and introduced myself. I became very friendly with him. Then in that spring quarter, George Stigler visited Stanford, and through Aaron I became very friendly with George. Through Aaron Director I was put on a task force on antitrust policy for the president-elect, the infamous Nixon. The task force was headed by George Stigler, and Ronald Coase was one of the members. I met Milton shortly afterwards. That year I learned about the Chicago approach to antitrust.

Reason: In *The Economics of Justice* (1981), you described the common law as a tool to maximize aggregate social wealth. You said that is what judges sought to do through their decisions. Was this an original insight, and what attacks were made against it at the time?

Posner: It was pretty original. There are hints of it in Ronald Coase's article on social cost. He wasn't too clear about it, but the implication that I drew was that he thought the English judges had been trying to make an economically sensible law of nuisance. And Harold Demsetz, one of the Chicago economists now at UCLA, wrote something which hinted at this.

The idea was criticized on two basic grounds. One, that it doesn't fit the facts. There are too many anomalies, too many rules, too many outcomes in common law cases that can't be explained as efficiency-promoting. That is one criticism, and obviously there is some merit to it. Another criticism objects to the notion that judges would be concerned with economic efficiency rather than with more distinctively legal or moral concepts such as fairness. That sticks in the craw of many lawyers. By now, I think everyone agrees there is strong economic content in the common law, and the law generally, although how important it is can be questioned.

Reason: In *Economic Analysis of Law* [1973], you made large claims for economic analysis, not just regarding contracts or antitrust cases but also in criminal law, family law, racial discrimination, and federalism.

Posner: Yes, that's correct. Oddly, the area where the most resistance has been encountered is the criminal law. There is a really interesting body of economic writing about criminal law, about both deterrence and punishments—the whole punishment structure. Also, about the doctrines of attempt and conspiracy. I think this is very interesting stuff that has made no real impression in the teaching of law. There was an economist in the United States Sentencing Commission, and there is definitely an economic flavor in the federal sentencing guidelines. But apart from that, the criminal bar and professoriate have not been receptive.

Feminists, in recent years, have picked up the law and economics ball and have run with it. It's a very interesting inversion of conventional positions, but a number of radical feminists now are strongly advocating the commodification of family relations. What they say is we want to commodify, to put a pecuniary value on, the work that women do outside the markets, because if it's not commodified, not monetized, it's not recognized in our society as productive work.

Reason: While you were attacked from the start for applying economics to all sorts of law, as a judge you have been attacked from the other side for not consistently using economics in your decisions. What do you think about that criticism?

Posner: There are two aspects of that. First, there are simply many legal issues to which economics doesn't speak. When you are talking about the teaching of law or scholarly writing about law, the focus tends to be on the big questions and large principles that inform a field of law. There, I think the economic approach is very fruitful. But in the actual day-to-day litigation process, many of the cases involve issues that are of a purely interpretive, purely factual character, dealing with the details of comprehensive statutes, and they just don't lend themselves to economic analysis. Many other cases do. I have written many tort, contract, antitrust, and labor cases where I thought an economic angle was valuable. But we're talking about 1,800 judicial opinions.

The second point is that the experience of being a judge is bound to moderate one's views. When you are dealing with large doctrinal policy issues in a rather abstract way, it's very easy to allow your general outlook on things to carry you to foreordained conclusions. But when you are actually forced to consider both sides of the case, often you realize

"The Supreme Court should not have permitted the Jones case to go forward during Clinton's term of office. It was a serious mistake."

there is more to be said on the other side of the case than you might have thought. So a lot of statutes that I would have ridiculed as preposterous interventionism in the economy, when looked at up close in the context of the specific case, make more sense. I have learned there is more to be said for some of these interventionist laws than I had initially thought.

Reason: You have described yourself as a pragmatist, and you've been described by others as an eclectic libertarian. Do you see yourself as a libertarian? I know you are a follower of John Stuart Mill in some ways.

Posner: Yes, I regard myself as a libertarian, in a sense that has virtually disappeared from the American public scene. It is basically the Millian sense, but without buying into all of Mill's views. Apart from the fact that he was writing almost 150 years ago, his thought isn't entirely consistent. He had a lot of specific views that seem very strange to me. But I think of myself as someone who believes that the government should intervene only where private activity is palpably harmful or where there are external benefits. For example, an educated population benefits the society as a whole. You benefit from the fact that other people are educated, just as you benefit from the fact that other people subscribe to the telephone service. Where there are external benefits, there is a case for government intervention.

The reason libertarianism doesn't have much support anymore in the U.S. is that liberals, as they describe themselves today, believe in freedom of personal behavior—sexual behavior and so on—but want to regulate markets, whereas the conservatives want markets to be free but seek to regulate people's personal behavior. The libertarian doesn't like either form of regulation, unless it meets pretty tight criteria: The target of government intervention has to be an activity that either imposes external costs or creates external benefits. That position, I think, has very little appeal.

Reason: Most legal pragmatists—people like Richard Rorty—are from the left. Yet you describe yourself as a pragmatist, and your views are generally considered right-wing.

Posner: There is a historical, accidental connection between pragmatism and leftism, personified by John Dewey. For Dewey the enemy was religion. He thought religion, and forms of scientific thought that are successors to religion and promise ultimate truth, interfered with social progress, because he associated social progress with experimentation. Experimentation implies that you don't know the answer; that is why you have the experiment. So Dewey and successors like Dick Rorty are fighting against a kind of Platonic heritage, the notion that there are ultimate truths that are knowable, and once we know them we have no reason to listen to other people. That perspective is very different from the sense that everything is in flux, implying experimentation.

The other association of pragmatism with the left is that philosophical pragmatism, with its skepticism about truth claims, has an uncomfortable resemblance to the thought of the postmodernists, who are invariably politically radical. People like Michel Foucault or Jacques Derrida seem to want to challenge all kinds of structure and thought in society, and that seems radical and destabilizing. People who are drawn to that kind of intellectual anarchism, or who think that the important thing is knocking religion off its pedestal, are going to be left-wing.

My sense of pragmatism is not philosophical pragmatism but the ordinary-language meaning of the term. When people say Americans are pragmatists, they don't mean they are postmodernists with strong philosophical views about the correspondence theory of truth. They mean they are not interested in large theoretical questions; they are interested in practical solutions to current problems. That is the lay sense of pragmatism and also my sense. I don't want to get tangled in metaphysical questions. I didn't always feel this way, but today I don't want to argue that efficiency is the most important thing in the world and aggregate wealth is the only thing society should care about. I can defend an emphasis on efficiency in the law on practical grounds, which will create results most people like, but I'm not prepared to erect a metaphysics of efficiency that will prove that's the only thing we should be worrying about.

Reason: You've complained that academics and judges don't know enough about the outside world.

Posner: The outside world is not the world of philosophical speculation. It's the world of fact. The philosophical pragmatists—people like Rorty or Stanley Fish or some of the "crits" who considered themselves to be postmodernists—they don't have much interest in how things actually work. There is a texture of social and economic life. It's that level of factuality that I think is important and that lawyers and judges are deficient in.

Reason: Does this have anything to do with your new book, *Public Intellectuals*?

Posner: It has a little bit to do with it. I guess the worst form of public intellectual activity is where the intellectual is speculating in a factual void—maybe because he is dealing with a field that is completely unrelated to his academic work. For example, in the *Times* last Sunday there was a funny article about Elaine Scarry, the English professor at Harvard, who writes about plane crashes. She has this notion of a kind of electromagnetic Bermuda Triangle in the North Atlantic that keeps knocking planes off. She actually did research, and it wasn't completely ridiculous. The *Times* pointed out that the experts had read her stuff and didn't consider it completely crazy, but they didn't agree with it. When you write outside your field—although I should not really throw that particular stone—there is the temptation to write about things without the kind of factual immersion that would be necessary for responsible engagement with the issue.

In my book I make fun of Lester Thurow, an economist at MIT, who says that in the year 3000 economists will look back to our day and say this was the Age of America. Three years ago, he thought it was the Age of Japan. So he is reckless in predicting the future.

I have added to my book a few pages on the ads of the Emergency Committee of Concerned Citizens about the election. On the op-ed page of *The Wall Street Journal* today, there is a humorous article about the academics and the celebrities who sign these petitions. I think the ad first appeared three days after the election. It must have been done within 24 hours. It's a goofy document that asks for a revote, and University of Chicago law professor Cass Sunstein, who signed it quickly, later backpedaled. It's quite amusing. So when academics talk outside their field, or they make predictions, or they try to respond to something current on a journalistic time scale, they can get into trouble.

Reason: In your book on the Clinton impeachment, you criticize almost everyone except for the media.

Posner: The media at first were fiercely criticized for giving currency to unfounded rumors, of which the most dramatic was the dress. But in retrospect, it did not appear that they made serious errors or displayed prejudice. I thought they did pretty well.

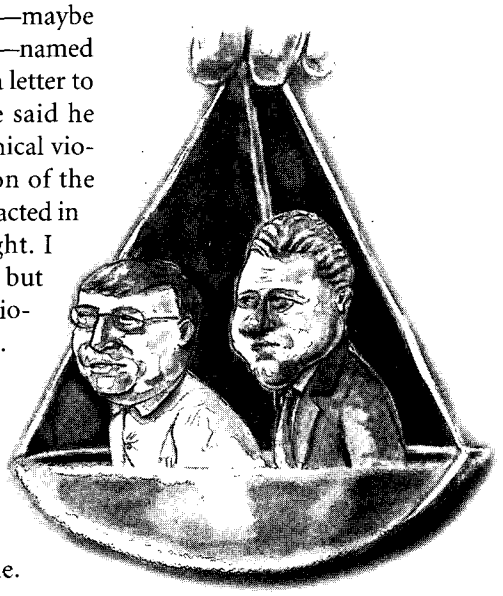
Reason: But everyone else messed up. What should have happened? Should the Supreme Court have allowed the case? Should Clinton have admitted the truth?

Posner: I do think the Supreme Court should not have permitted the Jones case to go forward during his term of office. I think that would have been a hard opinion to write, but they should have realized that to allow the president to be hauled into court for a sex case would be very disruptive of the government and would really exacerbate partisan passions. They could easily have told Paula Jones to wait two years. Then the case would have been settled, as it was eventually. It was a serious mistake of the Supreme Court. There were, of course, many political blunders committed by both sides. I thought the intellectuals came off as hysterical and uninformed. It was quite a donnybrook. I don't think it had any bad consequences for the country, but it was a mess.

Reason: Speaking of donnybrooks, you were attacked in *The New York Review of Books* by New York University law professor Ronald Dworkin, and you responded in kind. I might add that, according to Fred R. Shapiro in *The Journal of Legal Studies*, you are the most frequently cited legal scholar, and Dworkin is number two. Do you have anything to add to this clash of the heavy hitters? He accused you of acting unethically as a sitting judge by injecting yourself into a partisan political debate with your book on the impeachment and by drawing conclusions about Clinton's guilt when he was open to future prosecution.

Posner: I usually don't respond to criticisms, and I wouldn't have responded to this one, but I didn't like being accused of an ethical violation. You can't really be impeached for something that minor, but you can be reprimanded by your court; that has happened to judges. So I thought I should respond, lest people think that I acknowledged it.

There was a letter later by an old guy who used to be a very prominent lawyer—maybe he still is, though he must be ancient—named John Frank, a lawyer in Arizona. In a letter to *The New York Review of Books*, he said he didn't think I had committed an ethical violation—he had a learned discussion of the esoteric issue—but he thought I had acted in bad taste. He may very well be right. I wouldn't take any umbrage at that, but the accusation that I had actually violated the code of judicial conduct....



Reason: You were, of course, attacked on both sides for the book.

Posner: This was funny: A high school classmate of mine is the parliamentarian of the House of Representatives, and he told me that Henry Hyde wanted to meet me.

So the next time I was in Washington, I called up this fellow and he brought me over. Henry Hyde regaled me with a detailed critique of my book in which he picked out every criticism that I had made of the Republicans, which turned out to be quite numerous, and he rebutted them point by point. He was very pleasant about it; he's actually a very nice person. He seemed really sharp. I didn't agree with all his criticisms, but it was interesting that he took the time to prepare a rebuttal.

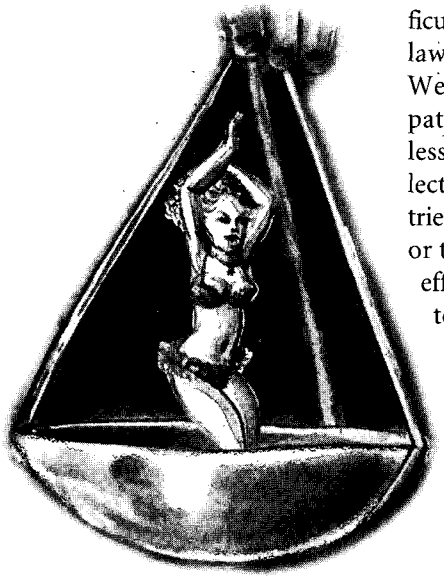
Reason: Was it tough to be the mediator in the Microsoft case? All of a sudden, you had the spotlight on you.

Posner: Yes, but I made clear at the outset that I would have no contact with the press, would not answer any questions, and wouldn't permit my staff to have any contact with the press. I thought that worked fine. The press didn't retaliate against me for not cooperating with them. What happened eventually, which was inevitable, was leaks by the parties. I didn't blame the press for their probing, but there were significant inaccuracies in the press reports, as you would expect, because they were depending on leaks.

Reason: In the 1980s, you wrote that the cost of limiting access to a work through copyright law has to be measured against the benefit the law provides—the incentive to create the work in the first place. Have things changed much since then, in particular because of the Internet and the ease of making and distributing digital copies?

Posner: There is a basic problem I have not solved. I don't know if anyone has. It is just extraordinarily difficult to know what is the optimal amount of any given body of intellectual property. That is one problem.

The second problem is it's extremely difficult to gauge the effect of intellectual property law on the amount of intellectual property. We know that if there were no copyright or patent or trade secret laws, there would be less invention and there would be less intellectual creativity. It's hard to imagine industries like the film industry or the book industry or the pharmaceutical industry functioning efficiently without intellectual property protection. The problem is that if you expand intellectual property protections, you can actually get to a point where you have as little intellectual property produced as you would if there were no protection, because all intellectual property trades on and embodies earlier intellectual property.



Suppose there were perpetual copyright, and it was very broad. So if you're making a movie you may have to find Homer's heirs and negotiate a copyright license with them. If someone had a patent on the wheel, every time you built a truck you would have to get a license from the descendents of some caveman who thought up the wheel. If there is too much protection of intellectual property it's stifling, and if there is too little it also stifles creativity.

Something like the Internet comes along, and on the one hand it makes it easier to steal, but on the other hand, by expanding the market for intellectual property, it also increases the returns. So how you figure out what the right approach is is baffling. People who know more about it than I do—like Larry Lessig of Harvard or Mark Lemley of Berkeley—they have strong views on this. Maybe they're right. But I don't know enough about it to have an opinion.

Reason: Looking at antitrust cases, without discussing Microsoft specifically, don't they often simply give an advantage to weak competitors who wouldn't otherwise make it?

Posner: That certainly is a danger, no question about it. It's true about any legal right that you give to a business firm. They will deploy it if they think they can increase their profits.

Reason: What is an example of a good antitrust action?

Posner: The core of antitrust is forbidding cartels and their informal counterparts, the price-fixing conspiracies, and preventing mergers that either create a monopoly or that so concentrate a market that they facilitate price fixing in a form difficult to deal with directly. That is the core. In the controversial area, there are the alleged exclusionary practices: tie-ins, predatory pricing, bundling, vertical integration, exclusive dealing, full line forcing, price discrimination, predatory advertising—all sorts of things, an endless list. Very controversial. There is unquestionably a sum of these shenanigans that is a proper concern of antitrust. It seems there are a lot of cases that don't make any sense at all. On the other hand, there are some cases where the defendant is a monopolist and, in rational self-interest, is engaging in a practice that could exclude equally or more efficient competitors.

Reason: What do you think of antidumping laws or predatory pricing laws?

Posner: I don't think antidumping laws really have anything to do with antitrust. A company that wants to fix prices in a market can do that only by limiting its output. If, rather

than limit the output, it dumps its excess output in some other market at a very low price, it makes a little bit of money. But it's not trying to take over that second market; it's just trying to minimize its losses from the fact that it's curtailing its output. So it's not really a monopolistic practice.

There is a huge literature on predatory pricing now. There are some well-documented cases in which firms did engage in predatory pricing, and there is some theoretical basis for concern. On the other hand, it's very difficult to distinguish predatory pricing from simple price competition. The risk that a strict law on predatory pricing will discourage price competition and encourage collusion is very great. So you really have to tread delicately in that area.

Reason: As a pragmatist, how do you feel about the rule of law? Do you think it's an imaginary concept that people pull out to justify the result they prefer?

Posner: I wouldn't say that. It depends on how you define the rule of law. If the rule of law means that law has to be a closed, logical system, mechanically administered with no discretion for judges, I think that's wrong. If the rule of law means that the judges are constrained by rules, so far as those rules are knowable, then when the rules aren't knowable, when judges have discretion for whatever reason—the novelty of the issue, the confusion of the legislation, the vagueness of the constitutional provision—then the rule of law requires that the judges act in a nonpartisan fashion, that they be reasonable and intelligent and nonpolitical. That's the best you can expect of them if it's a truly ambiguous case.

Reason: In 1990 you wrote a famous concurring opinion in a case involving nude dancing, arguing that it has limited protection under the First Amendment. Was this part of being a pragmatic judge? Part of your reasoning seems to be that it's just too much trouble to prevent all sorts of nude dancing. If it's not based on rights, what's the argument?

Posner: As a libertarian, I don't think nude dancing in private should be regulated. But as a judge, my reaction is somewhat different, which is that the problem of drawing lines is impossible. This nude dancing, although it has minimal artistic value, is on a continuum with entertainment and art in general, which often has a strong erotic cast. The only reason to think this nude dancing was in a different class was that its artistic aspirations were extremely modest. But that doesn't seem to me a good reason for distinguishing it from lyric opera.

Reason: Do you get time to see movies and TV?

Posner: My wife and I don't go to the theaters; that's too much of a bother. But we rent movies or buy movies. I like comedies. I don't like serious movies. I make an occasional exception, but I like comedies and my tastes are pretty catholic. I'm very enthusiastic for the Marx Brothers; I like Joe Pesci a lot; I like Meg Ryan; I like the Cary Grant–Katharine Hepburn movies.

Reason: What about TV?

Posner: I do channel flipping late at night, so I see little pieces of this and that. Occasionally, I'll see an old movie or sometimes the animal channel. Or I'll watch the cable news programs. I don't have a very good sense of the full television sphere. I have never seen a situation comedy.

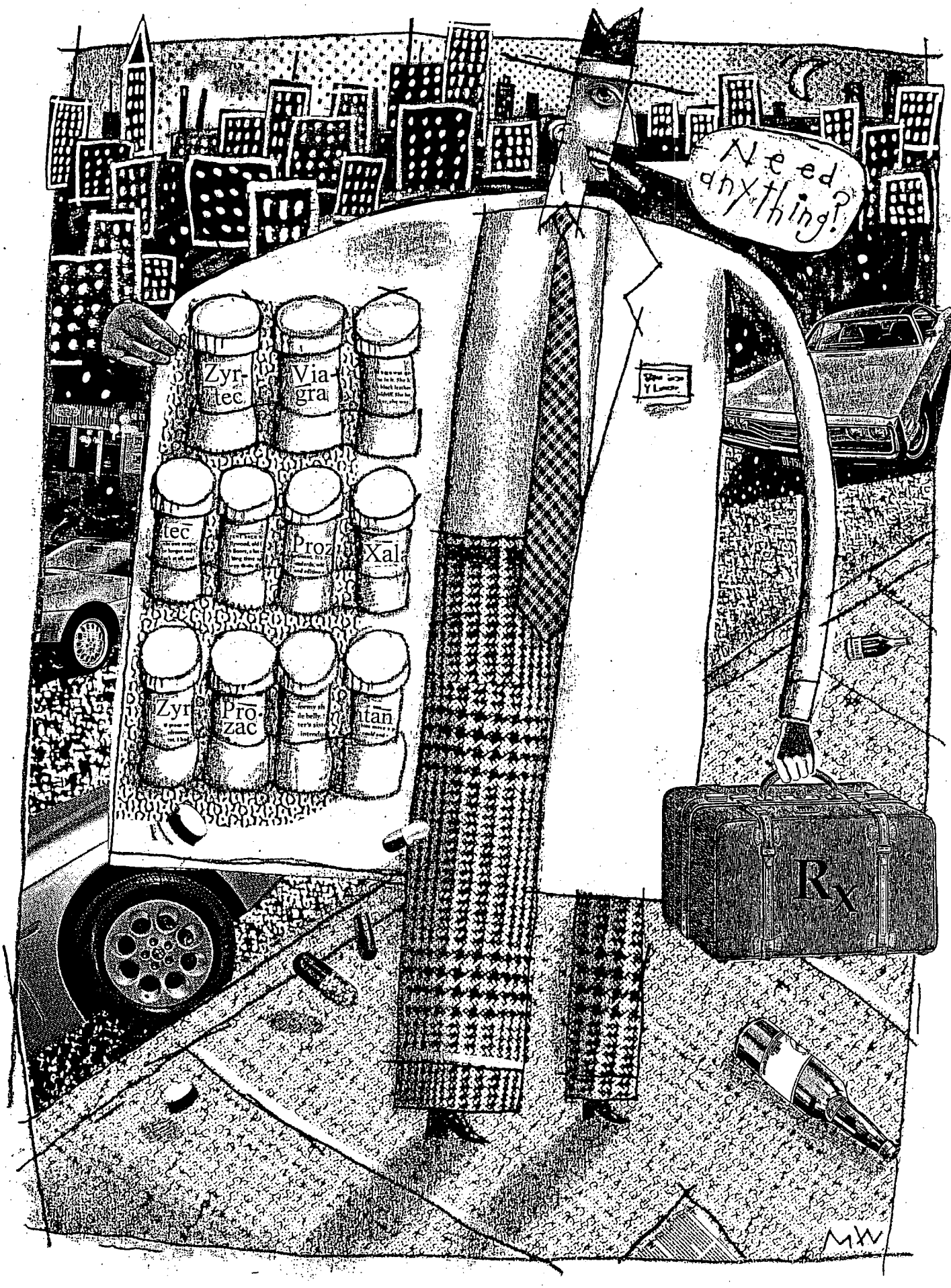
Reason: But you understand, as a libertarian, that some people like Jerry Springer and some people like PBS.

Posner: I actually had a case involving one of these let-it-all-hang-out talk shows. It was Jerry Lopez. Have you ever heard of him? He disappeared. He had one of these programs where ordinary people reveal their private lives in the most immodest fashion. That struck me as really vulgar, but if that's what people want. ...It was all about 15-year-olds getting pregnant and being confronted by their mothers' lovers. Weird stuff, but the funny thing about it was they all seemed to be having a great time. The audience was really nosy, asking really personal questions—very vulgar entertainment for someone of my generation. But people are free to do whatever they want. It doesn't seem to do any harm.

Reason: You've said that if people were forced to stop watching TV, it's not as if they would turn to reading philosophy.

Posner: Sweden has very, very bad TV. They have only a few channels, poor reception, government channels. It's only on a few hours at night, I think. It's really incomplete. So I asked a friend of mine, a Swedish economist, what Swedes do. Do they read more? He said no. They don't read more. What they do, in contrast to America, is more family socializing. They draw with each other. Family socializing, family conversation takes place, usually on an extremely low plane. Americans probably are better informed than they would be if they had no television, because then they would just be talking to each other.

"As a libertarian, I don't think nude dancing in private should be regulated. But as a judge, my reaction is somewhat different."


Need anything?
Zyr-tec
Via-gra
Prozac
Xanax
Rx
MW

Goddamn the Pusher Man

Drug companies saved my marriage.

Get that smirk off your face, for this is not a tale of Viagra. Two years ago, I asked Pamela to marry me. She said yes, making me a happy man—arguably the happiest man on Earth. But that tender moment was only possible because of what I am more than willing to call a miracle drug. You see, Pamela owns two cats, and she had made it clear that if I was going to live with her, I was going to have to live with her two cats as well. "I gave up my cats for my first husband, and I'm not going to do it for a second one," she declared.

The problem is that I am allergic to cats. The solution is the new antihistamine Zyrtec, developed by Pfizer in 1995. I take one pill a day and the felines can rub their fluffy tails across my nose without provoking so much as a sniffle. (Zyrtec doesn't cause drowsiness, either.) So now we are living happily ever after

Why does everybody seem to hate the pharmaceutical industry?

MICHAEL WARAKSA

By Ronald Bailey

in wedded bliss. A month's supply costs $66.25 at my local pharmacy, but what price love?

Yet the development of products such as Zyrtec—not to mention Viagra and birth-control pills—has not bought pharmaceutical companies a lot of love. Quite the opposite. When Al Gore listed "Big Drug Companies" along with "Big Oil, Big Tobacco, and Big Polluters" as foes of the American people in his acceptance speech at last year's Democratic National Convention, he wasn't going out on a limb. He was tapping into widespread bad feelings toward pill makers. John Le Carré, the best-selling British writer famous for his Cold War spy novels, casts pharmaceutical companies as the new global villains in his 2000 novel *The Constant Gardener.* Communist dictators are out as bad guys and drug company CEOs are in.

The pill-pushing industry is now one of the top targets of politicians and much of the public for ire, wrath, and (possibly) regulation. The most frequent complaint is that prescription drugs cost too much, that their costs are spiraling out of control. There's no question that Americans are spending more on prescription drugs than they used to. In 1997, our total spending on drugs increased by 14.2 percent from the previous year; in 1998, it went up 15.7 percent; and in 1999, it rose again by 18.8 percent. During that same time span, the overall inflation rate never rose above 3 percent per annum.

So the drug companies must be gouging patients and health care providers, right? No. Many critics have made the mistake of confusing more spending with higher prices. In other words, prices aren't going up—we're buying more. Spending on prescription drugs is rising rapidly because Americans like me are buying more pills; our medicine cabinets are bulging with new treatments for whatever ails us.

Between 1993 and 1999, overall inflation rose 19 percent while drug prices increased 18.1 percent. In some years inflation outstripped drug price increases, while in others drug prices rose faster than inflation. For example, in 1996 inflation was 3.3 percent and drug prices increased only 1.6 percent; in 1998, inflation rose 1.6 percent and drug prices went up 3.2 percent. The vast majority of the spending increase on drugs—some 78 percent—has occurred because doctors and patients are taking advantage of the more and better drugs that are now available.

During the 1990s, the pharmaceutical industry developed nearly 400 new drugs, many of which act as substitutes for older, more expensive medical treatments. When other industries develop new products that people want—personal computers, say, or cell phones—we typically laud them for their innovation and willingly plunk down our money.

So why are pharmaceutical companies in the doghouse, especially since they are making products that save and enrich our lives? The answer includes political opportunism, large doses of ignorance regarding the drug industry's economics, and an entitlement mindset among many consumers. Those are potent sentiments that, in today's policy climate, are particularly troubling. If enacted, the most common proposed solutions to the prescription drug "problem" would actually undermine an industry that has greatly enriched our quality of life.

Cost Analysis

Just how much are Americans spending on prescription medicines, and what are they getting in return? According to the Bureau of Labor Statistics, the average consumer spends just over 1 percent of her annual income on pharmaceuticals, about the same amount that gets spent on tobacco and alcohol. The elderly, who are by far the largest consumers of medicine, spend roughly 3 percent of their annual income on drugs, about the same amount they spend on entertainment. Households with seniors 65 to 74 years old spend $1,587 on entertainment and $698 on drugs, while those over 74 years old spend $875 on entertainment and $719 on drugs. (The average income for 65–74-year-olds is $28,928; for those over 74 it is $23,937.)

Many critics have made the mistake of confusin going up—we're buying more. Spendin more pills; our medicine cabinets are bulgin

As mentioned before, Americans are indeed spending more on prescription medicines in absolute terms. Average expenditures per household were $301 in 1993 and $370 in 1999. But spending totals aren't the end of the analysis. A more important question is whether we are getting value for our money. According to Columbia University economist Frank Lichtenberg, the answer is absolutely yes. Between 1960 and 1997, life expectancy at birth for Americans rose from 69.7 years to 76.5 years. "Increased drug approvals and health expenditure per person jointly explain just about 100 percent of the observed long-run longevity increase," writes Lichtenberg in a working paper done last year for the National Bureau of Economic Research. Lichtenberg found that for an expenditure of $11,000 on general medical care, there

is a gain of one life-year on average. (A life-year in this context is simply an extra year of life that a patient gains by being treated.) However, spending just $1,345 on pharmaceutical research and development gets the same result. Economists have calculated that, on average, people value an extra year of life at about $150,000. (That figure is based on people's willingness to engage in risky jobs.) Assuming an average value of $150,000 per life-year, the benefits from medical care expenditures outweigh the costs by a factor of more than 13; the benefits of drug R&D are more than 100 times greater than its costs. As important, drugs can also reduce health care costs. In "Do (More and Better) Drugs Keep People Out of the Hospital?"—a 1996 study published in the *American Economic Review*—Lichtenberg found that "a $1 increase in pharmaceutical expenditure is associated with a $3.65 reduction in hospital-care expenditure."

The story of stomach-acid-blocking drugs such as Tagamet and Zantac illustrates how drugs save money by keeping patients out of the hospital. In 1977, the year in which such drugs were introduced, surgeons performed some 97,000 operations for peptic ulcers. In 1993, despite population growth, that number had shrunk to 19,000. The shift from surgery to highly effective pills—a change that has made life better for tens of thousands of people with stomach problems—is the sort of quiet development that escapes much attention. The Boston Consulting Group's health care practice reported that it saves patients and insurers at least $224 million in annual medical costs.

Other examples abound. In 1991, for instance, the benefits that drugs offered became painfully apparent when New Hampshire, in a cost-saving measure, adopted spending caps on the number of reimbursable medications that Medicaid patients could receive. The result was that nursing home admissions doubled among chronically ill elderly patients and raised government costs for institutional care by $311,000, which was 20 times more than was "saved" by imposing spending caps on drugs. As John Calfee, a drug policy analyst at the market-oriented American Enterprise Institute, has noted, drugs that break apart blood clots cut hospitalization and rehabilitation costs for stroke victims by about four times the cost of the drug. In his recent monograph *Prices, Markets and the Pharmaceutical Revolution*, Calfee also reports that schizophrenia drugs costing $4,500 per year save more than $70,000 in annual institutional treatment costs.

A yearlong study of 1,100 patients done by Humana Hospitals found that using drugs to treat congestive heart failure increased pharmacy costs 60 percent, but cut hospital costs by 78 percent, for an overall savings of $9.3 million. Better still, the death rate dropped from an expected 25 percent to 10 percent. In Virginia, an asthma study found that new asthma drugs cut emergency room visits by 42 percent. And, relevant to my cat situation, a study by the consulting firm William M. Mercer concluded that every $1 spent on non-sedating antihistamines yielded a $3.07 return to employers, due to increased productivity and reduced accident costs.

"The ability of pharmaceuticals to reduce the total expenditures for health care, as well as business costs, is important but secondary," concludes Calfee. Modern drug therapy means "patients and consumers...are gaining...better health, longer life, reduced pain and discomfort, and other blessings."

Obscene Profits

OK, grant some critics of the industry. Drugs dramatically cut some medical costs, they say, but the drug makers are reaping huge—obscene, really—profits. In fact, drug company profits as conventionally calculated do run to as much as 20 percent, while 5 percent profit margins are typical of many other American industries. That 20 percent figure, however, is deceptive, since the standard accounting procedures used to calculate drug company profits write off R&D costs as "current expenses." No other industry has nearly as high R&D expenses, so when other industries write off their R&D it doesn't have as much effect on their rate of return calculations. If pharmaceutical R&D were depreciated over time, then annual profits for the industry drop to around 9 percent.

That's still almost double the average rate of return. What explains it? Drug discovery and development is a notoriously risky business. "Some 5,000 to 10,000 molecules are screened and only one will make it to being a drug," explains Kees Been, vice president for business and marketing at Biogen Inc., a leading biotech pharmaceutical company based in Cambridge, Massachusetts. "From discovery to launch takes 12 to 16 years. Only 30 percent of all products ever invented returned more than what was invested in them," adds Been. That means that 70 percent of the drugs

ıore spending with higher prices. Prices aren't
ın prescription drugs is rising because Americans are buying
vith new treatments for whatever ails us.

currently available for treating and curing people are in fact economic losers for the companies that developed them.

A 1999 study by Duke University economists Henry Grabowski and John Vernon for the Tufts University Center for the Study of Drug Development analyzed the sales of a cohort of drugs introduced between 1988 and 1992. The study found that the top 10 percent of new drugs accounted for more than half the total sales revenues of drugs. "The returns to R&D projects in pharmaceuticals have similar properties to that of venture capital investments," conclude Grabowski and Vernon. In other words, drug companies, like venture capital firms, throw money at a lot of different high-risk projects knowing that virtually none will pan out, but that a few may score real jackpots.

These jackpots cover the losses on the other projects and, perhaps more important, pay for future bets. In this way, revenues from such blockbuster drugs as Prozac for depression, Celebrex for arthritis pain, Viagra for erectile dysfunction, and Lipitor for controlling cholesterol levels do more than cover the costs of the majority of drugs that do not make a profit; they also fuel further research.

Drug companies, like venture capital firms, throv
projects knowing that virtually none wi
jackpots cover the losses on the other project

Investment in R&D for any given drug is not trivial. Typically, it costs between $300 million and $500 million to bring a single drug from being a gleam in a lab jockey's eye to delivery to the marketplace. Yet one argument that critics often make is that drug companies sell their pills for dozens, if not hundreds, of times more than it costs to make them. The liberal policy magazine *American Prospect* made just this case in its September 11, 2000, issue, in an article titled, "The Price Isn't Right." The piece cites an analysis that claims Bristol-Myers Squibb can manufacture a patient's 18-month supply of the popular cancer drug Taxol for just $500, but charges over 20 times more than the manufacturing costs.

This kind of "analysis" is just willfully stupid. For many products whose value is essentially embodied in intellectual property—drug makers get a 20-year patent on new drugs—copies can be manufactured very cheaply once the product has been developed. Hence, it may cost hundreds of millions of dollars to create the first copy of a computer program, but the second copy is little more than the cost of the CD onto which it can be downloaded. The same holds true for most pharmaceuticals. Manufacturing that first pill takes millions in conducting research and clinical trials, in processing regulatory filings and building a factory, in establishing distribution channels and generating advertising. The second pill may indeed take only pennies to make physically, but virtually all the money to create it has already been spent by the time that second pill goes into a pharmacist's bin.

"A pill is very small, so people have the intuition that it shouldn't have a high price," says Alison Keith, who recently stepped down as head of economic and science policy analysis at pharmaceutical giant Pfizer. "But a better way to think about our medications is that they are small tablets wrapped in huge envelopes of information."

Double Billing?

A related charge regarding pharmaceutical costs is the idea that patients are actually paying for drugs twice—the first time as taxpayers through government-funded scientific research and again as patients, when they go to their local drugstore to pick up their prescriptions. "Research funded by the public sector—not the private sector—is chiefly responsible for a majority of the medically significant advances that have led to new treatments of disease," argues *The American Prospect.*

Is that true? The annual budget of the National Institutes of Health, the major government grant-giving institution for medical research, was $17.8 billion in 2000 and is expected to rise to $20.5 billion this year. Meanwhile, the pharmaceutical companies' R&D budgets totaled $26.4 billion last year—almost 50 percent more than the 2000 NIH budget. (Industry R&D expenditures equal more than 20 percent of what pharmaceutical companies make in total sales, making the industry the most research-intensive business in the world.) What roles do government and private-sector research actually play in the drug discovery and development process?

"Government-supported research gets you to the 20-yard line," explains Duke's Grabowski. "Biotech companies get you to the 50-yard line and [the big pharmaceutical companies] take you the rest of the way to the goal line. By and large, government labs don't do any drug development. The real originator of 90 percent of prescription drugs is private industry. It has never been demonstrated that government labs can take the initiative all the way" to drug-store shelves.

George Whitesides, a distinguished professor of biochemistry at Harvard University, similarly appreciates the role of often-government-funded research labs at universities in the early stages of drug development. But he stresses that "pure"

research rarely translates into usable products. "The U.S. is the only country in the world that has a system for transmitting science efficiently into new technologies," he argues. That system includes research universities that produce a lot of basic science and get a lot of government money. In turn, startup companies take that lab science and develop it further. "Startups take 50 percent of the risk out of a product by taking it up to clinical trials," explains Whitesides. "Industry has an acute sense of what the problems are that need addressing." Without private industry to mine the insights of university researchers, taxpayers would have paid for a lot of top-notch scientific papers, but few if any medicines.

Frank Lichtenberg, the Columbia economist, has a slightly different take on the question of whether patients are paying twice for drugs. He cites the example of Xalatan, a glaucoma drug developed by Pharmacia & Upjohn. Last April, *The New York Times* ran a news story suggesting that although some of the original research on Xalatan was backed by a $4 million NIH grant in 1982, the "taxpayers have reaped no financial reward on their investment." Not so fast, says Lichtenberg. In 1999, Xalatan represented 7 percent of sales for Pharmacia & Upjohn, so Lichtenberg reasonably assumes that 7 percent of the company's $344 million in corporate income tax payments that year can be attributed to Xalatan. Thus Pharmacia & Upjohn paid about $24 million in income taxes on its 1999 sales of Xalatan. Just counting that one year of increased taxes as if it were the only return ever for a 17-year-old investment, Lichtenberg calculates that this yields a very respectable 11 percent return on the taxpayers' money. In fact, future sales are very likely to be higher, "so the return on the taxpayers' investment is likely to be considerably greater."

money at a lot of different high-risk pan out, but that a few may score real jackpots. These and, perhaps more important, pay for bets.

Placebo Effect

"Big drug companies are putting more money into advertising and promotion than they are into research and development," said Al Gore on the campaign trail, neatly summarizing another popular complaint against the pharmaceutical industry. This widespread assertion, however, is just plain wrong. In 1999, for instance, the pharmaceutical industry spent $13.9 billion on advertising and promotion. (Half the promotion costs, incidentally, were for drug samples that doctors give to patients for free.) R&D expenditures for 1999 were more than $24 billion.

There are, to be sure, more drug ads around these days. In 1997, the Food and Drug Administration, concerned about a couple of First Amendment lawsuits against its regulations, relaxed its restrictions on advertising prescription drugs. Since then, there has been an explosion of direct-to-consumer television and print ads for prescription drugs. In 1999, pharmaceutical companies spent $1.8 billion appealing directly to consumers. Industry critics charge that advertising directly to consumers causes patients to demand drugs they don't need. As Gore put it, drug makers were nefariously "spending hundreds of millions of dollars on television and on magazine advertising to persuade people to buy newer and more expensive medications when less expensive versions work just as well."

Such charges raise several issues. First, do less-expensive medicines work just as well as those "newer and more expensive ones"? In a study of the benefits and costs of newer drugs, Lichtenberg shows that older drugs are, in general, not as good as newer drugs. Using data from the 1996 Medical Expenditure Panel Survey, an in-depth national survey of the health care expenditures of more than 22,000 people, Lichtenberg developed an econometric model to compare the costs and benefits of using older and newer drugs to treat similar medical conditions. He concluded that "the replacement of older by newer drugs results in reductions in mortality, morbidity, and total medical expenditure." Lichtenberg also found that "*denying people access to branded drugs* [as opposed to cheaper generic drugs] *would increase total treatment costs, not reduce them, and would lead to worse outcomes*" (emphasis in original). Newer is clearly better.

What about the claim that advertising simply tricks consumers into demanding more expensive drugs? Obviously, advertising can generate interest in a product—that, after all, is the whole point. But the idea that advertising can simply create a demand for a worthless product is no less convincing when it comes to medical care than it is for other goods and services. If anything, it is less so in this case, since the advertiser needs to convince two buyers—the patient and her doctor—to make a sale.

More to the point, such criticisms ignore basic realities of the health care market. "There are substantial societal benefits to health from consumer advertising," says Alison Keith from Pfizer. "Patients have a lot of information about themselves that otherwise would not go into the medical system." A survey in 1999 by *Prevention* magazine estimated

that direct-to-consumer advertising encouraged nearly 25 million patients to talk with their doctors about illnesses or medical conditions that they had never discussed before. In my case, a television ad for Zyrtec showing people being pursued by herds of allergen-generating cats alerted me to its marriage-saving possibilities. As important, by providing information outside of the traditional doctor-patient relationship, direct-to-consumer advertising can also give patients some protection against incompetent or indifferent physicians who have failed to keep up with new developments.

"The industry...also downplays the fact that many 'new' drugs aren't medical breakthroughs," complains *The American Prospect*, jabbing away at the pharmaceutical industry, looking to win its argument on points if not by knockout. "About half of industry research is aimed at developing me-too drugs," that treat problems already addressed by existing medications, it adds. The implication is that companies are simply trying to take market share away from each other without providing any "real" benefits to patients.

Such a scenario ignores the simple fact that companies are likely to be researching similar drugs to begin with and that one firm has to be first to market. But so-called me-too drugs actually benefit patients, not simply by offering different treatments for similar conditions—Tagamet and Zantac, for instance, have different active ingredients—but by driving down prices in a given treatment category. "The period of one-brand dominance for an innovating drug within a breakthrough therapeutic category has unmistakably shortened," writes AEI's Calfee. This faster competition leads to price cuts among competing medicines. Hence, when new anti-depressant medications were introduced in the mid-1990s, they cost only 53 percent as much as Prozac did when it first hit shelves in 1988 and had the field more or less to itself. Similarly, new cholesterol-lowering drugs that came to market in the mid-1990s cost 60 percent less than pioneering effort Mevacor did when it first showed up in 1987.

Trying to devise some sort of drug benefit for administration—is treacherous policy can have serious consequences, especially with

First, Do No Harm

The Hippocratic Oath famously insists that doctors do nothing to worsen a patient's condition: First, do no harm. Unfortunately, when it comes to most policy recommendations regarding prescription drugs, the potential for harm, usually in the form of price controls and universal, mandatory coverage, lurks everywhere.

Central to virtually all "reform" agendas is reining in those drug company profits. Will that contain health care costs? "Suppose we seize all pharmaceutical profit," suggested Sidney Taurel, CEO of Eli Lilly & Co., in a speech last October. "Drugs are just 8 percent of total health care. To simplify the arithmetic, let's stretch and say [profits are] 20 percent of sales. Twenty percent of 8 percent equals just 1.6 percent of total health care costs. Does that sound like a solution to you?" Despite its political appeal, it's not much of one. In fact, that sort of thing would almost certainly retard the development of new drugs by destroying the incentive for research. (It's not called the profit *motive* for nothing.)

Given their relatively small cost as a percentage of health care dollars and overall household consumption, why have drugs raised the ire of politicians and populists so forcefully? The short answer is third-party payments. "Most of the drugs are not being paid for by users. Third parties are paying but not getting the benefits, so they are very concerned about costs," explains AEI's Calfee. As doctors prescribe more drugs to cure and ameliorate the ills that afflict their patients, this means that health insurance and managed-care providers are spending more on drugs. Insurers, in turn, pass along the additional spending to their customers, companies who provide job-based medical coverage, whose bottom lines are squeezed by the additional spending.

In many cases, spending on drugs does lower health care costs, but often enough the new drugs do cost more than earlier, less effective therapies, so third-party payers are shelling out more money while patients are getting greater benefits. From a strictly actuarial point of view, it's cheaper for patients to drop dead of heart attacks than for the government or insurers to pay for years of cholesterol-lowering life-extending drugs. Employers who don't want to pay the rising costs for employee health insurance, and politically potent seniors who have been schooled by Medicare to think that all health care is a right, complain to legislators that drug costs are out of control. Such complaints focus on increased spending on drugs, while ignoring the costs saved through pharmaceutical treatments and the suffering and disability that afflicted patients before pharmaceutical companies developed the new drugs.

The policy initiatives that respond to such complaints are

fraught with problems. Those that simply award consumers more money specifically earmarked for drugs amount to little more than corporate welfare, by giving pharmaceutical companies a new revenue stream. More typically, though, policies that address prescription drugs end in some sort of price control scheme that, by undercutting the possible return to investment in the pharmaceutical industry, will over time harm patients by reducing the supply of new drugs. Trying to devise some sort of drug benefit for seniors—a major goal of the Bush administration—is treacherous policy territory, since misguided or ham-handed regulation can have serious consequences, especially with respect to not-yet-invented drugs. During the debate over the Clinton health plan, notes AEI's Calfee, just the threat of price controls spooked pharmaceutical R&D. "Growth in research spending dropped off dramatically from 10 percent annually to about 2 percent per year," according to Calfee.

Yet the perception that drug prices—and drug company profits—are too high is likely to drive policy. Last year, Congress passed legislation allowing the reimportation of drugs manufactured in America from Canada, where drug prices are significantly lower due to price controls, which are in place in some form in virtually all developed nations outside the U.S. The law drew part of its moral authority from the fact that American drug companies routinely sell their drugs abroad at lower prices than they do in the U.S. Why shouldn't Americans get as good a deal? asked lawmakers.

Essentially, companies are selling their products abroad at prices well below their long-run development costs, but above their current manufacturing costs. While the drug companies can make some money this way, it's not enough to generate the profits necessary to fund their enormous R&D costs. Indeed, it is because of our relatively unregulated market that the U.S. provides the rest of the world with new drugs. Over the past two decades, companies in the U.S. have produced nearly 50 percent of the world's leading pharmaceuticals. Today, U.S. drug companies make all 10 of the world's best-selling drugs. Due to other countries' price controls, pharmaceutical research and development has increasingly been centered in the United States.

With regard to Congress' reimportation scheme, former Secretary of Health and Human Services Donna Shalala refused to certify the program on the grounds that she "could not demonstrate that it is safe and cost effective." However, if Tommy Thompson, the new HHS secretary, approves the program, it will be Canadians and not Americans who will be in for a rude price shock. "The drug companies will not sell to Canada at the current rate," says Calfee. "They will raise their prices to Canada in order to not undercut their markets in the U.S." As evidence, he cites a 1999 General Accounting Office report which found that a "law requiring drug companies to grant Medicaid the best price offered to managed care firms effectively raised the managed care prices rather than lowered Medicaid prices." Instead of lowering prices, reimportation and matching-discount requirements eliminate any incentive to give discounts at all.

We are entering a golden age of pharmaceutical research. With the completion of the Human Genome Project, "all pharmaceutical targets until the end of time are now known," said Biogen's Kees Been, at a presentation in December at the Massachusetts Institute of Technology. At the same meeting, Sean Lance, CEO of Chiron, a biopharmaceutical company located near San Francisco, predicted, "We are going to win over HIV, malaria, and tuberculosis because of biotech."

eniors—a major goal of the Bush
erritory, since misguided or ham-handed regulation
espect to not-yet-invented drugs.

Such certitude—bordering on arrogance—would be irredeemably smug, if not for the pharmaceutical industry's track record in raising the quality of life. "In the 1950s and '60s, doctors performed millions of tonsillectomies and put grommets in the ears of children to prevent earaches. Now we know that they don't work," said Lance. "In 10 years' time, we're going to look back and laugh at what we're thinking are complicated issues and technologies today."

If we want the pharmaceutical and biotech companies to find and market new life-saving, life-enhancing drugs to cure and treat heart disease, cancer, dementia, diabetes, AIDS, and other illnesses, then Congress and President Bush would be wise to let the sort of relatively unfettered market competition that has worked well in the past continue into the future. "There is no substitute for the profit motive for inducing and guiding research," says Calfee. In a recent article in *Science*, Jurgen Drews, chairman of International Biomedicine Management Partners and former head of global research at Hoffman-La Roche, concludes that "free markets will be capable of generating the technical and institutional instruments that are needed to apply scientific advances to the solution of societal problems." True enough. But only if we let them.

Ronald Bailey (rbailey@reason.com) is REASON*'s science correspondent.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A Rendezvous with Density

The FDR Memorial and the Clinton Era

By Michael Valdez Moses

During the waning days of his much-besmirched presidency, as he frantically hustled about the globe in a desperate attempt to fix his "legacy," William Jefferson Clinton found time to dedicate a new and controversial statue of Franklin D. Roosevelt. Placed at the entrance to the FDR Memorial, the statue portrays Roosevelt seated in what is unambiguously a wheelchair, thus inaugurating a mode of political remembrance ostensibly free of false idealization. Or such is the statuary conceit.

Clinton, ever the self-promoter, has long sought to link his presidency with that of FDR. In May 1997, Clinton presided at the opening of the memorial to FDR, a monument happily consonant with the self-image cultivated by both Bill and Hillary during their own years in the White House. Should any visitor fail to make the connection between the two presidents, the floor-to-ceiling granite plaque that graces the foyer of the Information Center of the memorial features the name of WILLIAM J. CLINTON prominently etched just below that of FRANKLIN DELANO ROOSEVELT.

Clinton's dedication is above and in larger characters than the names of the FDR Memorial Congressional Committee members, architect Lawrence Halprin (who worked on the project for more than 20 years), private donors, and the citizens of the United States on whose behalf Congress so generously allocated funds.

JOHN MATTOS

To be sure, when architect Halprin first drafted his design in the mid-1970s, he could not have anticipated how faithfully his work would embody the animating spirit of the Clinton years. But such is genius that by representing the past it may peer into the future.

Bordering the Tidal Basin, the memorial occupies seven and a half acres, considerably more than is devoted to any other memorial on the Mall. Consisting chiefly of a series of massive granite walls that support a landscaped and mounded earthwork, the monument is constructed partly below ground. As a result, the FDR memorial is easy to miss, and from some vantage points invisible.

Nonetheless, the memorial to FDR fittingly embodies Bill Clinton's Orwellian pronouncement that the "era of big government is over." Enormous Carnelian granite blocks—31,239 of them—form a series of walls 12 feet high that constitute its chief architectural feature. One of the most massive and sprawling structures on the Mall, its gargantuan dimensions are cunningly crafted to escape notice. Eschewing the formality and grandiose neoclassicism of the Washington Monument and the Jefferson and Lincoln Memorials, the modernist-inflected FDR Memorial unobtrusively melds into its "natural" setting.

The land on which the memorial stands is in fact composed of mud dredged from the Tidal Basin in the late 19th century. The unstable topography, still settling, could not support the structure's massive weight, so a reinforced concrete deck over 900 steel pilings driven 100 feet into the ground was built as a foundation. In his commemorative account, *The Franklin Delano Roosevelt Memorial*, Halprin assures us that despite its vast expanse and ambitious engineering, the memorial "feels as if it's part of the earth."

In short, the memorial casually symbolizes federal bloat at the end of the century. An elephantine governmental structure that took more than 50 years to be realized (the first resolution to build a memorial to FDR was introduced into Congress in 1946), the monument is discretely disguised such that it appears to have always been an integral, even natural feature of our American landscape.

The FDR Memorial consists of four outdoor "rooms," each corresponding to one of FDR's presidential terms. These rooms feature a variety of bronze statues and bas reliefs, as well as an impressive series of waterfalls and pools symbolizing various events and achievements in the life of the man whom Halprin refers to as "one of the four great presidents of our 220-year history as a country." (It would seem that the wrong Roosevelt is carved into Mount Rushmore.)

Into the walls are engraved in supersized capital letters THE GREAT WORDS of Roosevelt, whom Halprin compares, without a hint of irony, to the prophet Moses, "who led his people to the promised land but was never able to cross into it." Whereas Moses required a mere pair of stone tablets on which to record the word of God, FDR's deep thoughts stretch across hundreds of thousands, even millions, of tons of expensively quarried granite transported from South Dakota.

THEY (WHO) SEEK TO ESTABLISH
SYSTEMS OF GOVERNMENT BASED ON
THE REGIMENTATION OF ALL HUMAN
BEINGS BY A HANDFUL OF INDIVIDUAL
RULERS... CALL THIS A NEW ORDER.
IT IS NOT NEW AND IT IS NOT ORDER.

The official deification of an American president is not unprecedented (Lincoln in his memorial is loosely modeled on Zeus in the temple at Olympia), though rarely has a memorial architect been so insistent that the visitor comport himself as a religious pilgrim. Halprin repeatedly calls the monument "a sacred memorial space" set apart from the "secular" recreational areas that flank it. The memorial, we are assured, is not designed for thoughtless acts of tourism, but is meant to unfold "a processional narrative," to inspire the penitential supplicant with its "spiritual, contemplative character." Our "processional passage" is punctuated by a series of devotional stops, including a penultimate pause in the Fourth Room before the recessed niche containing Neil Estern's bronze statue of Our First Lady of the United Nations and World Peace, Eleanor Roosevelt, her hands dutifully crossed in a manner studiously imitated by Hillary Clinton.

Though Halprin designed the memorial as "a walking experience" (not just a walk, but a walking *experience*), the official CD audio guide sold by the National Park Service assures us that it is fully in compliance with the Americans with Disabilities Act. A good deal of controversy surrounded Neil Estern's original larger-than-life bronze statue of FDR. Given that Roosevelt, with the connivance of the contemporary press, scrupulously hid from public view his own disability (stricken with polio at age 39, he was paralyzed from the waist down for the remainder of his life), Halprin and his artistic comrades debated whether the image of "one of our greatest heroes" should refer to his handicap.

Their original solution is an artistic equivocation worthy of Clinton himself. The 1997 bronze image of FDR is based on a photograph taken of a recumbent and ailing president at the 1945 Yalta conference. Estern's Roosevelt is seated on a chair equipped with tiny casters; but the chair is modeled not on the one on which FDR was photographed in Yalta, but on the one he used in his private residence at Hyde Park. Three casters are concealed beneath a bronze cape that drapes over Roosevelt's body. Only one small caster, which faces toward the back of the stone niche in which FDR's bronze image rests, is visible, and then only to the visitor unceremonious enough to climb around the seated figure and into the niche.

The disabled, who since 1997 have had to solace themselves with the knowledge that FDR's leg braces, encased in glass like the relics of a medieval saint, are on view in the monument's foyer, may now celebrate the newly dedicated statue of FDR conspicuously seated in a wheelchair. Though only four of some 10,000 extant photographs of FDR show him in a wheelchair, the National Organization on Disability, its president, Alan A. Reich, and the philanthropic investor, Peter Kovlar, successfully lobbied Congress to include Robert Graham's new life-sized statue that openly displays the physical limitation FDR was always so careful to conceal. Ever the linguistic pioneer, President Clinton proclaimed the new statue a "monument of freedom." His deep identification with his hero perhaps led Clinton to an uncharacteristically self-revealing assessment of FDR: "He was a canny fellow, and he didn't want to risk any vote loss from letting people see him in a wheelchair."

Nor are the disabled the only group whose special interests are addressed and celebrated at the memorial. Greens are reassured by FDR's very own words that the president—whose legacy included the Tennessee Valley Authority and the construction of the Hoover Dam, two projects unlikely to pass muster with Naderites were they to be proposed today—was a deeply committed environmentalist: "MEN AND NATURE MUST WORK HAND IN HAND." (Halprin, whose studies at the Harvard School of Design evidently did not include economic history, assures us that the underlying causes of the Great Depression were "farming malpractice, destruction of the natural environment, and large-scale erosion.") Robert Graham's bronze mural, *Social Programs*, dutifully represents the faces of America's various ethnic and racial minorities; even the granite on which the bronze mural is mounted, Halprin assures us, though "uniform in grain" is "diverse in its makeup."

The more pacific wing of the Clinton generation, lest they be put off by the Third Term Room with its imposing Broken Wall and thunderous cataract, meant to evoke FDR's heroic leadership during the chaos of World War II, are to be comforted by the words of a 1936 presidential campaign speech that, according to the audio tour, promised "to shun political commitments that would draw [the nation] into foreign wars." Engraved not once, but twice upon the granite blocks in the Third Term Room is the single declarative sentence: "I HATE WAR." Halprin's equivocal memorialization of American triumph in World War II, filtered through the anti-war sentiments of the Vietnam era, is perhaps a more fitting tribute to the 42nd president, who dodged the draft in his youth and cynically bombed Sudan and Afghanistan to distract attention from Monica Lewinsky's grand jury appearance,

JAMES P. BLAIR / CORBIS

than it is to our 32nd chief executive.

Of course, in the rough and tumble of special-interest politics, some groups will inevitably lose out. All reference to one of FDR's most memorable talismans, the smoldering cigarette holder, was quietly omitted from Estern's statue, indeed from all images of the president that adorn his memorial. No Cigarette Smoking Man in evidence here. Halprin's is an FDR perfectly suited to the politically correct Clinton '90s.

The two most remarkable features of the memorial are the Second and Third Term Rooms, celebrating the New Deal and FDR's war leadership respectively. The Second Term Room is subdivided into two facing chambers, the first punctuated by a set of bronze statues executed by George Segal—"The Fireside Chat," "The Breadline," and "The Appalachian Couple"—depicting the experiences of ordinary folks during the Great Depression. The second facing chamber celebrates the New Deal, focusing on the creation of 54 alphabet agencies and social programs that, according to Halprin, "elevated the country from the quagmire into which it had sunk." (Halprin's efforts at what he terms "an experimental history lesson" for the masses are partly undermined by the official audio tour. The "Appalachian Couple," we are instructed, is also meant to evoke the dust bowl of the Great Plains.) Significantly, neither Halprin's official commemorative volume nor the Park Service audio tour mention that the nation sank more deeply into the quagmire of the Great Depression in the years following the initiation of the New Deal in 1933. But what's an experiment without a glorious failure or two, or 54 for that matter?

Segal's statues of the farm couple, a line of unemployed urbanites standing in a bread line, and a lone male figure sitting by his Philco radio "entranced by the voice" of FDR might be said to suffer from an "imitative fallacy." According to Halprin, Segal meant his bronze figures to embody the "inherent individual dignity" of ordinary men and women. Realistic and life-sized portraits of the down-trodden and degraded, they are unlovely to look upon. Segal and Halprin's gesture toward democratic inclusiveness merely accentuates the radical gulf that separates the patrician leader who wields real power in the White House from the plebes and proles. Halprin's book reveals that Segal wrapped his models from head to foot in bandages, before covering them in plaster molds, which were later used to caste the bronze statues. No doubt the process greatly enhanced each model's "inherent individual dignity."

REUTERS NEWMEDIA INC. / CORBIS

Robert Graham's bronze mural, *Social Programs*, unintentionally manages to embody the more sinister and subterranean aspects of the New Deal, which, among other things, helped usher an often dehumanizing bureaucracy into everyday American life. The images of the common folk on his mural are rendered as fragments —a Sargasso Sea of isolated hands, faces, and random body parts, rarely if ever comprising a whole individual. These dismembered citizens are mere scattered pieces lost among Braille inscriptions, symbolic icons of federal programs, and a swarm of initials—the acronyms of the alphabet agencies. The classic republican relationship envisioned by Jefferson and the Founders is here reversed: The government is not the creation of individuals for the purpose of protecting their natural rights, but rather, a towering and mechanical federal bureaucracy that literally creates the people by stamping itself on the malleable clay of the nation. The resulting chaos of dismembered bodies and wandering souls (which might just as suitably serve to represent the carnage of World War II in the Third Term Room), we are assured, accords with a grand design conceived by a remote and all-knowing social engineer who really does love the people.

Though it is impossible to argue with FDR's principled struggle against fascism or to be unimpressed by the architectural achievement of the Third Term Room, it is no less beset by unintended irony. Having become familiar in the First Term Room with the words of FDR's ringing proclamation: "AMONG AMERICAN CITIZENS, THERE SHOULD BE NO FORGOTTEN MEN AND NO FORGOTTEN RACES," we are reminded in the passage to the room devoted to FDR's stewardship during World War II that "WE MUST SCRUPULOUSLY GUARD THE CIVIL RIGHTS AND CIVIL LIBERTIES OF ALL CITIZENS, WHATEVER THEIR BACKGROUND." Apparently Halprin felt it best to omit any unsettling allusion to FDR's executive order to inter Japanese-American citizens during the great man's finest hour. Similarly, his unwillingness to integrate the armed forces (that would fall to Truman) goes unmentioned.

The official audio tour offers a series of parallel narratives here: "FDR and Churchill," "FDR and Stalin," "FDR and Fala" (no kidding; a bronze statue of FDR's Scottish terrier sits at the president's feet), all meant to uplift our spirits and enumerate for us the war-hating president's wartime accomplishments. We are lectured on the president's Lend-Lease agreements with Churchill and Stalin, and reminded of his insistence that America become the "THE GREAT ARSENAL OF DEMOCRACY." Unprecedented levels of U.S. government arms shipments to Stalin's totalitarian regime no doubt heart-

ened advocates of democratic self-rule everywhere, just as the transfer of sensitive computer and missile technology to China did under Clinton.

There are no audio narratives on FDR's attempt to pack a Supreme Court that regularly found many of his progressive initiatives in violation of the U.S. Constitution, or on his unprecedented concentration of power in the White House, and only praise for his tremendous expansion of the size and role of the federal government and his vainglorious abandonment of Washington's historic precedent of not serving more than two terms.

In his commentary on the Fourth Term Room, which memorializes the death of FDR in 1945 and celebrates the subsequent establishment of the United Nations, Halprin would not have us forget that before his untimely passing, the president "had achieved his goal of freeing the world from the menace of dictatorships." Those who have listened attentively to the audio guide account of FDR's war-time relationship with his great ally Joseph Stalin will be forgiven if they are impatient to make their way to the exit.

In St. Paul's Cathedral in London, on the inconspicuous tomb of its architect, Christopher Wren, are engraved the words *Si monumentum requiris, circumspice*—roughly, "If you would seek his monument, look around you." Wren understood that the edifice of St. Paul's, visible throughout the whole of London, would serve as the architect's most fitting memorial, rather than another lavish tomb. Like Wren, Roosevelt never expressed the desire for an ostentatious monument to himself. He asked to be remembered only by a plain stone engraved with his name, and such a stone was long ago placed in front of the National Archives. FDR grasped more firmly than his epigone, Bill Clinton, who is ever ready to flaunt himself before the American public, the Machiavellian lesson that to wield great personal power in a democracy means to conceal the scope and nature of that power. It is not Halprin's memorial, but the seemingly countless colossal government buildings flanking the Mall in Washington, D.C., many bearing the names of those bureaucratic agencies he created, that are, alas, FDR's most enduring legacy.

Michael Valdez Moses (mmoses@duke.edu) is an associate professor of English at Duke University, a fellow at the National Humanities Center, and the author of The Novel and the Globalization of Culture *(Oxford University Press).*

Surfing Secrets

The multiple meanings of online privacy

By Jennifer DePalma

Internet privacy isn't just one debate, it's several. One involves how much information an e-business should be allowed to require of its customers, and what it should be allowed to do with the data it collects. (Does a Web site, say, have the right to pass data along to third parties?) Another debate centers around when the government should have access to information shared online. Then there's online anonymity: Should people be allowed to post e-mails or Web pages under false names? What should be the legal repercussions of giving a site false information?

And don't forget things like firewalls that protect sites from unwanted visitors and encryption tools that keep data and information top secret. The police want to be able to search networks for illegal activity (gambling, child pornography, hacking, etc.). They therefore dislike the idea of strong encryption—or would at least like a guaranteed means of breaking that encryption should the need arise. But weaker encryption increases the chances that your privacy will be violated—that someone else will get access to the information you transmit online.

The Hundredth Window: Protecting Your Privacy and Security in the Age of the Internet, by Charles Jennings and Lori Fena, New York: The Free Press, 278 pages, $26

It's an important set of arguments. Many people understandably dislike the thought of corporations or the government amassing detailed profiles of them: Even if the profile keepers have the best of intentions, there's still the possibility of stolen identity or wrongful accusation. How receptive consumers are to e-commerce depends on how secure they feel using it. On the other hand, such information is valuable to companies: It helps them learn what their consumers want and improve their products.

It sounds like a tangle, but there's a straightforward thread that runs through all of these questions: how best to balance economic and technological improvement with freedom and personal space. Yet the debates often cloud this basic concern by spinning worst-case scenarios as though they were commonplace. Hyperbole, wild generalizations, and outlandish predictions about the possible uses and likely abuses of information are common. Few authors present the facts and lay out the issues in a way that lets laypeople develop an informed opinion, deciding for themselves what potential dangers are lurking.

The Hundredth Window is, for the most part, an exception. Authors Charles Jennings and Lori Fena give their readers the tools to make competent, independent decisions—if readers are willing to endure some slanted editorializing and ignore some grandiose theorizing. Jennings and Fena, founders of TRUSTe, an Internet privacy assurance organization, have put together a nuts-and-bolts text that summarizes the current debate and highlights the major events that have influenced it. There are some splashes of hyperbole and fear mongering, too, but that seems to come with the territory.

The book includes some useful hints on protecting your privacy while you surf the Web and engage in e-commerce. Interspersed among chapters on the development of data and the author's relevant theories are "Tips and Tricks"—practical,

easy-to-follow instructions on erasing cookies, securing passwords, keeping e-mail private, and other ounces of prevention, as well as advice on what to look for in a Web site's privacy policies.

Like most commentators, Jennings and Fena view privacy concerns from the perspective of the frightened consumer looking for an impractical degree of control over the information he volunteers on the Web. One of the principles endorsed, borrowed from the Online Privacy Alliance, is this: "No data should be collected from you and used without your permission." Requiring consent above and beyond that implied in volunteering the information has led to efforts as ridiculous as demanding a parent's written assent—via the U.S. mail!—before a child could interact with a Web site.

Through our choices as consumers, we will shape the Internet in a manner that respects our privacy while allowing the development of conveniences.

But the authors also detail the benefits of releasing information—cheaper prices, personalized service, quicker transactions—more honestly than most privacy advocates do. The authors realize that many users find the Internet relatively safe and are willing to trade privacy for convenience. The authors do not think such confidence will continue, however, and predict that abuses of personal information will increase to an extent likely to drive e-consumers from the ease of ordering groceries and books online back to old-fashioned shopping in person at local stores.

In their words: "Unless [personal data] collection and use become both measured and monitored, our great new electronic commons of the Internet may itself be put at risk, as people recoil in disgust or fear when learning how vulnerable they are to online surveillance, behavioral profiling, and other data-consuming activities."

Jennings and Fena acknowledge that simple answers to privacy questions do not exist for anyone—consumers, technologists, or businesses. Oddly, they then assert that the country needs to reach a consensus on the issue as soon as possible; without one, they assert, "privacy issues will become a major obstacle to continued growth in the electronic marketplace." For proof, they cite international tensions, such as those between the United States and the European Union. The E.U. had threatened to stop information flows to the U.S. unless the latter instituted certain laws and bureaucracies, such as a national agency dedicated to monitoring the corporate use of personal information. The Clinton administration managed to calm E.U. fears without making any serious proposals for national privacy police or overarching laws; it remains to be seen whether that delicate balance will continue in the new administration.

This dispute is a preview of the future, as countries push treaties governing trans-border information flows. Whatever those regimes end up looking like, there is no reason to think that even that sort of "common consensus" would solve micro-level conflicts between companies and consumers. Customers, after all, desire varying levels of control over their personal information, and "consensus," which would never be unanimous, would readily lead to mandatory procedures. Since no one could guarantee a consensus with the right answer, if one right answer even exists, those procedures would dissatisfy many users—and stultify the creative energies that could create better solutions.

The best solutions, of course, are those that let consumers choose among diverse alternatives. It's one thing to call for certain ground rules, such as transparency in the market, that might help ensure true consumer choice. But Jennings and Fena seem to be looking for more-specific standards. For instance, they are comfortable requiring companies to handle personal information in one consistent way, or to report their possession of such information to the government at certain times. They would require all Web pages to advertise their privacy policies the same way, relying on one agency—maybe public, maybe private—to classify the level of privacy protection, much like the movie industry's single ratings system. In short, they don't mind mandated uniformity.

In all fairness, Jennings and Fena also recognize the benefits of experimentation and choice. The best approach, they argue, is to "allow technology developers a rela-

CHIP BOK

tively free rein, so that innovation and expansion can proceed apace—but then to use the Net to learn quickly from the inevitable mistakes, and respond with the forces of public opinion, marketplace behavior, and, when clearly necessary and only as a last resort, government regulation." The authors believe privacy is a higher priority than technological growth, but they aren't blind to the pitfalls of government intervention. They also understand the power the media have in punishing companies that break agreements with consumers and unfairly release information to third parties. For instance, after *The Washington Post* released a story in 1998 naming supermarkets and drug stores that legally sold prescription drug records to database marketers, the stores ended the transfers.

Speaking of the media, Jennings and Fena never confront the free speech arguments embedded in the privacy debates. Telling a data collector that he cannot distribute as he desires the information he has collected is a lot like telling a student that she cannot share what she learns in class with people outside her college. Some view personal information as more akin to ideas and thus protected by the First Amendment, while others see such data as property subject to certain government controls. Where does *The Hundredth Window* come down in this debate? It ignores it.

Jennings and Fena make a bit too much of the new medium. The book is laced with such portentous statements as, "What's really at issue [with privacy and the Internet] is our core identity, and perhaps our humanity." Really? We might have "instinctual needs for privacy," but societies have found radically different ways to obtain or even define that privacy, given changing external circumstances. In some tribal cultures, where living in a room with 10, 15, or more family members was common, when a person sat close to a wall, facing it, he was left alone.

No matter what the Internet brings, human beings will find enclaves of space and time for themselves. We will also, through our choices as consumers, help shape the Internet in a manner that respects our privacy while still allowing the development of conveniences that increase the time we have for ourselves. Rapid change instigates new apprehensions, leading to calls for quick fixes. But as the novelty of the Net wears off, the exaggerations and hoopla surrounding Internet privacy will dissipate. We will then have a greater objectivity—and a history of market behavior—with which to approach the problems that persist.

Jennifer DePalma (jdepalma@alumni.princeton.edu) is a third-year student at the University of Chicago Law School.

Going *Bezirke*

Where little platoons and little governments meet

By John McClaughry

About a decade ago, after years of managing public policy through large governmental systems in Maryland, George Liebmann was struck by an important insight: Why not make more use of "sublocal" governmental institutions? Operating at the neighborhood level and close to the people, these little governments are informal and inexpensive, sometimes quaint and funky. Most important, they perform services the way the people want, not the way the system-builders in far-off capitals desire.

This insight sent Liebmann, a graying Baltimore lawyer and one-time executive assistant to Maryland's governor, on an intellectual odyssey that so far has resulted in three exhaustively researched books.

Solving Problems Without Large Government: Devolution, Fairness, and Equality, by George W. Liebmann, Westport, Conn.: Praeger, 170 pages, $55

The first, *The Little Platoons* (1995), reviewed the historical uses of sublocal governments in seven countries and suggested that such forms would have value in the United States. The second, *The Gallows in the Grove* (1997), focused on the legal rules governing the sublocal governmental forms that do exist in this country. It examined how "recent adventures in American constitutional doctrine" have weakened the initiative and autonomy of local and state governments, unions, churches, neighborhoods, and families. Now this third, small (and regrettably overpriced) volume discusses the practical uses of sublocal governments and addresses the issues of efficacy, oppression of minorities, and effects on equality.

"What is here offered," Liebmann writes in his introduction, "is a repertory of techniques and safeguards that have been found useful at other times and other places and that may, if taken seriously and not impeded by the courts, provoke an unorganized 'release of energy' similar to that instigated by a nonprescriptive nineteenth-century commercial legal development, the general incorporation law, which favored 'dynamic rather than static property, property in motion or at risk rather than property secure and at rest.'"

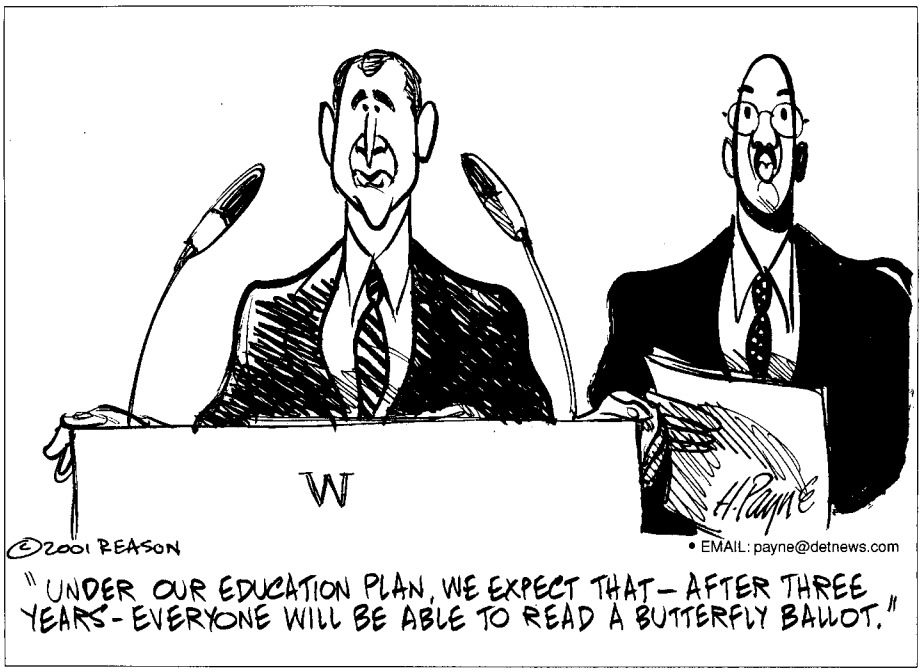
Across his pages march a fascinating procession of little-known civic life forms. He offers not merely the familiar town, village, neighborhood, and special district but also more exotic forms such as the *woonerf, roojinkai, phyle,* and *bezirke,* governed by everything from the *Lex Adickes* to residential community association covenants.

Although this is not a book about theory, it is founded on de Tocqueville's well-known insight that centralization of civic power leads to regularity, social control, repression of small disorders, and preservation of "society in a status quo alike secure from improvement and decline." But when society is to be moved in its course, de Tocqueville argued, centralized power becomes impotent. It is unable to direct the activities of its citizens simply by issuing orders, or even by pleading for cooperation. For society to move forward and improve, it is essential that the people exercise the power to act creatively, especially when they recognize themselves

as competent to act and are responsible for the results.

Liebmann's book offers more than a theoretical defense of this principle. It discusses Jefferson's advocacy of the small, independent "ward republic"; Kropotkin's anarchist dream of a decentralized Russia of fields, factories, and workshops; and Toulmin Smith's passion for the self-governing 19th-century English parish. Liebmann also draws support from such contemporary thinkers as Robert Bish, Fred Foldvary, Mancur Olson, Spencer MacCallum, and Robert Nisbet, all of whom have written on the merits of community, decentralization, and local autonomy.

Liebmann leads his discussion of creative techniques with a 25-year-old Dutch


W
©2001 REASON
• EMAIL: payne@detnews.com
"UNDER OUR EDUCATION PLAN, WE EXPECT THAT— AFTER THREE YEARS - EVERYONE WILL BE ABLE TO READ A BUTTERFLY BALLOT."

HENRY PAYNE

Sublocal services must be responsive to customer desires, because in such a small civic arena ordinary customers can have enough influence to force the providers to pay attention.

innovation, the neighborhood street government, or *woonerf*. Unlike a closed-off street, the *woonerf* requires the coexistence of vehicular traffic and people on the same space, a concept well known to generations of American city stickball players. Ramps, speed bumps, narrowings, axis changes, street furniture, planters, and trees—all decided upon by a single-purpose and very local government—have resulted both in a reduction of accidents and a high degree of resident satisfaction. The idea has spread to Denmark and Germany. In this country it is sometimes found where streets are privately owned, as in residential community associations and, uniquely for an American city, in St. Louis.

Another sublocal institution operating in the gray area between public and private is the Japanese *roojinkai*, or senior citizen mutual benefit organization. Funded by modest membership dues (60 percent), neighborhood association contributions (20 percent), and city government grants (20 percent), these groups manage hobby clubs, social events, trips, and community rooms. They also organize senior citizens in their areas for public health improvement programs.

The common principle of such civic forms is that they are not designed, imposed, or administered by some central authority. Rather, they are very, very local; they are very responsive to the desires of the people affected; and they are largely paid for by those same people. The efficacy of small, local, collective action has been established beyond much question, argues Liebmann, especially where (citing Bish and Hugh Nourse) "face-to-face service delivery by a labor-intensive bureaucracy is characteristic and where economies of scale are exhausted at a rather small size. Services such as police patrol, education, garbage removal, fire protection, and street maintenance [all] fit these criteria."

Why do these approaches work so well? For one thing, such sublocal services must be responsive to customer desires, because in such a small civic arena ordinary customers can have enough influence to force the providers to pay attention. If providers fail to pay attention, then customers have enough influence to have them replaced. Additionally, although Liebmann mentions it only in passing, real public decision making on a small scale elicits a healthy civic participation. Residents feel that their voices count and thus are willing to play a civic role they would be unable to play if decisions were made by unapproachable beings at a more remote governmental level.

Liebmann's catalog of techniques includes a long list of domestic, foreign, and historical examples. These include street privatization, eminent domain, land readjustment, and the residential community association. In such instances, decisions are variously made by unanimity and supermajorities; officials are chosen by election, sortition (i.e., by lot), and cooptation (i.e., new officials are chosen by existing ones); and disputes are settled by arbitration and judicial review. In such organizations, wrongdoers are brought to justice by the constable, the night watch, hue and cry, citizen militia, and posse comitatus. Results are measured by performance audits, funding achieved through assorted taxes, user fees, assessments, and tax base sharing. Irreconcilable conflicts are settled through secession.

One sublocal technique with great promise that is rarely used in the United States is what Liebmann calls "land readjustment." This is a technique, in use in Frankfurt since 1902, for rebuilding urban

go to 61

San Francisco Bleat

Have the lights gone down forever in the City by the Bay?

By Brian Doherty

Last month, I was in a bar in San Francisco's eclectic Bernal Heights neighborhood, an area with a reputation for being relatively untouched by the '90s yuppie invasion. The bartenders live in a nearby warehouse where I usually sleep during my monthly San Francisco visits, and the first hard cider was on the house. A variety show of magicians and comedians had the rapt attention of about 50 customers. At least half of the crowd, like me, were pals with the emcee, each other, the owner, or the bartenders. It's a vibrant scene that typifies the sort of small-scale, offbeat, community-based cultural scene for which San Francisco is famous.

Soon, though, the bartenders will be leaving the warehouse around the corner and heading deep into the away-from-the-action East Bay in search of more—and more affordable—space. It's uncertain how long the warehouse's owner will ignore the income opportunities from tossing out his current tenants for folks willing to pay top-dollar rent.

In leaving the city, my bartender friends are hardly exceptional. By last call, I was deep into a conversation with a friend about how many of the people she used to care about were already gone, how the places where she used to hang out are now unfamiliar to her.

When I don't flop at the warehouse, I stay in another living space of questionable legality, in a neighborhood I won't name. The people who live there—artists, performers, and sculptors—call their lair The Alamo: the last stronghold of the independent underground arts within the city limits. Over the five years I've been spending time in San Francisco, I've seen many venues, spaces, and people disappear, some for the East Bay, some for the East Coast. My San Francisco is dying.

So I came to *Hollow City: The Siege of San Francisco and the Crisis of American Urbanism*, by Rebecca Solnit with copious photographs by Susan Schwartzenberg (Verso), with much emotional sympathy. People, places, and scenes I love have been hit by the "crisis" about which Solnit writes. The influx of dot-com millions, she laments, has caused soaring rents and housing prices, and waves of newcomers have killed the old feel of neighborhoods; bohemians and many of the lower and working classes now find the city unaffordable or uncongenial. Her book is an extended *cri de coeur*—intelligent, deeply felt, with flashes of wit—on what has happened to the arty, progressive, multicultural San Francisco that she loved through the '80s and '90s.

SUSAN SCHWARTZENBERG

To her considerable credit, Solnit offers an honest historical perspective that undercuts the anger behind her elegy. She takes passing swipes at politicians for abandoning the housing market to "laissez faire," and drops an ominous hint at the end that the uprising of angry people who feel aggrieved by the recent influx of rich dot-commers will have shocking results. Like many progressives these days, she can't really articulate a viable political or economic solution to the problems she laments.

Indeed, Solnit seems to understand that her topic is not political. Rather, she's writing a tragedy of history made personal. In her own words, she's writing about "the melancholy of displacement of an individual." This melancholy is real, and it hurts. But everyone is culpable and no one is to blame. The San Francisco that she loves and lost was itself the result of constant change, some triggered by government-mandated urban renewal, some by Central Americans fleeing war and privation, and lots by the cumulative individual decisions of artists, hipsters, ethnic families, and progressives to move to a city and to neighborhoods where life seemed easygoing and cheap, if not quite free.

"In 1960," Solnit writes, marking the rapidity of some of those changes, the city "was 78 percent white, but by 1980 whites were less than 50 percent...and it was the nation's most ethnically diverse large city...since the 1950s San Francisco has been mutating from a blue-collar port city of manual labor and material goods to a white-collar center of finance, ad-

ministration, tourism, and, now, the 'knowledge industries.'" She relates the ever-changing history and feel of neighborhoods like South of Market and the Mission and she acknowledges implicitly that constant change is the very nature of a thriving city. (One older book about San Francisco is titled *Neighborhoods in Transition.*) She writes about white bohemians such as Kevin Keating, the poster artist behind the Mission Yuppie Eradication Project, who react angrily to the people who move in after them, but she isn't entirely sympathetic to them. Keating, for instance, has a confused, deeply personal message of contempt for the late arrivers, invoking fine distinctions only he can discern between acceptable sushi restaurants and ones that are simply fronts for yuppie colonization.

For the moment at least, the pace of change in urban centers may be slowing down along with the national economy. Certainly in tech-heavy San Francisco, there are already signs that soaring rents may be stabilizing as the dot-com boom continues to bust. Ironically—but predictably—Solnit's book is already showing its age. "For San Francisco to become a place that just provides opportunities to buy pet food online is...a decline whose effects will be felt far away," writes Solnit, referring to Pets.com, which went out of business in the gap between when Solnit wrote her book and its January publication. Indeed, the next wave of change is already upon the city. Some young dot-commer may be having the time of her life, and will soon be lamenting the passing of her favorite hangout (perhaps a theme bar or sushi joint that folks like Keating advocate destroying) and the unique, irreplaceable crowd of bright young people gathered in that magic city of San Francisco.

All of us live, love, drink, eat, carouse, and sleep atop the corpses of the past, a past that someone loves and misses. The city is dead, long live the city.

Brian Doherty (bdoherty@reason.com) is an associate editor of REASON.

slums. Instead of condemnation by an urban renewal authority or disguised private land assembly, land readjustment allows a supermajority of neighborhood landowners to require a pooling of land for redevelopment. Dissenting landowners are forced into the program but are given a pro rata ownership share of the project. Liebmann notes the parallel with well-developed U.S. state laws for the compulsory unitization of oil fields that underlie different parcels of land.

As his subtitle, "Devolution, Fairness, and Equality," suggests, Liebmann is at pains to answer mostly liberal critics of his earlier works by showing that a judicious use of available techniques, including supervening review by some "higher" government, can prevent oppression of minorities.

By ransacking history for intriguing examples, and through his exhaustive footnoting of official reports, statutes, and commentaries both ancient and current, Liebmann has done a notable service. Indeed, it seems like everything is here but my own favorite sublocal unit, the *wapentake*, a single-purpose defense district created in the 10th century to protect the English from Danish invaders.

In 1978, as a member of the National Commission on Neighborhoods, I had occasion to meet with leaders of neighborhood associations in seven large cities around the country. In schoolrooms, church basements, and neighborhood centers from Atlanta to Seattle, commission members heard the same story from neighborhood leaders. They said they were willing to work to improve their neighborhood and thereby make a better city for everyone. Unfortunately, they faced determined opponents jealous of their power and patronage: city, state, and national governments.

This book shows how sublocal governments and quasi-governments in use in many other countries can contribute creatively to social and physical redevelopment and to human well-being. Those in charge of America's cities badly need to grasp both the philosophy and the practicality of the examples and techniques Liebmann describes. Perhaps one day soon astute mayors will get the word. When they do, they will find this little book to be a gold mine of valuable ideas and examples.

Contributing Editor John McClaughry (john@ethanallen.org) is co-author, with Frank Bryan, of The Vermont Papers: Recreating Democracy on a Human Scale *(Chelsea Green).*

Getting Right with Bobby

The strange lure of Robert F. Kennedy

By John J. Pitney Jr.

In the 1960s, politics seemed bigger, bolder, more consequential. Back then, Florida was a training ground for the Bay of Pigs invasion and a focal point of the Cuban Missile Crisis. Now it's just the home of hanging chads. Back then, John Glenn rocketed into space and the nation prayed that his capsule would not burn up during re-entry. Now Glenn gets a second space trip as a retirement gift, and the nation prays that he remembered his spare dentures. Back then, Lyndon Johnson and Richard Nixon made a mark on American history. Now Bill Clinton just leaves a stain.

During that dramatic decade, politicians stirred our passions and gripped our collective memory even when they didn't accomplish much. Such was the case with Robert F. Kennedy. He spent much of his

Robert Kennedy: His Life, by Evan Thomas, New York: Simon and Schuster, 509 pages, $28

In Love with Night: The American Romance with Robert Kennedy, by Ronald Steel, New York: Simon and Schuster, 224 pages, $23

career ruthlessly helping his brother John win headlines and elections, then served as his attorney general in an administration that made little policy progress before ending abruptly with an assassin's bullet. RFK accomplished nothing of significance during his brief tenure in the U.S. Senate. Before his own assassination in 1968, he championed racial minorities and opposed the Vietnam War—but it was his enemy Lyndon Johnson who actually got Congress to pass civil rights legislation and Nixon who pulled America out of Vietnam (albeit gradually).

"Much of Kennedy's allure lies in the future conditional," Ronald Steel admits, "in what he *would* have been, what he *would* have done." *In Love with Night* explores this allure. It is less a biography than an essay on RFK's character and background, as well as the mythology that grew around him after his murder at age 42. Though Steel overlooks some of the darker episodes of Kennedy's life, his book offers a tough-minded analysis of a politician who worshipped toughness.

RFK is remembered as a devoted family man despite rumors of extramarital affairs, and as a high-minded idealist, though he was also a ruthless political operator.

In *Robert Kennedy: His Life*, Evan Thomas offers a full-scale biographical treatment, based on impressive original research, including newly available archival material. He differs from Steel on some incidental details. For instance, Steel says that journalist John Seigenthaler ghosted RFK's 1960 book on labor racketeering, *The Enemy Within*. Thomas claims that Kennedy wrote it himself. Overall, however, they agree on the basic facts. Where they part company is the interpretation of those facts—most significantly, on the answer to the oft-asked question, What kind of president would RFK have made? Thomas says that even if he had failed in the White House, Kennedy "would have failed trying his utmost to lift up the poor and the weak." Steel takes another view: "Instead of being the 'tribune' of the underclass, he would have had to become what every president ultimately is: a power broker."

At one point in his prologue, Thomas unintentionally sides with Steel's more skeptical appraisal. Kennedy, he writes, "was a Zelig of power—at the vortex, it seemed, of every crisis of the 1960s." Zelig, the title character of Woody Allen's 1983 movie, did in fact meet many famous people, but was not at the center of historic events—that was another filmic Everyman, Forrest Gump. Zelig was the human chameleon who could assume the appearance and mannerisms of anybody he met. Though Thomas meant to say something different, he actually got it right: RFK was a shape-shifter as times changed and circumstances dictated.

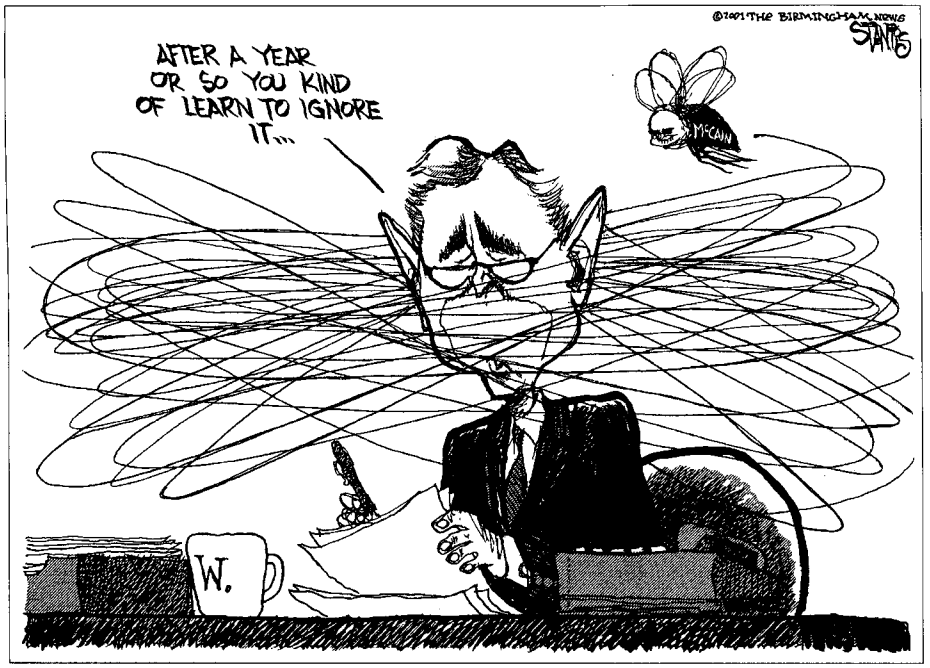
Many remember RFK as a scourge of Republicans and a prophet of peace with communist countries. They forget that he worked for Sen. Joe McCarthy (R-Wis.) at the height of Tailgunner Joe's popularity. After McCarthy's downfall and the rise of anti-anti-communism, RFK would claim that he bailed out as soon as he learned of the senator's irresponsible tactics. In fact, he got along just swell with McCarthy, who had dated two of his sisters and had gotten generous campaign contributions from family patriarch Joseph Kennedy. RFK's problem was McCarthy's chief aide Roy Cohn. An experienced attorney, Cohn resented the rich newcomer, who in turn sneered at Cohn's barely hidden homosexuality. Kennedy had a rotten time, and Thomas conjectures that J. Edgar Hoover hastened his departure by tipping off Papa Joe to McCarthy's imminent self-destruction.

Others of RFK's acts of apparent political courage amounted to less than they seemed. In the late 1950s, he served as chief counsel to the Senate Rackets Committee, where JFK was a member. Together they went after the Teamsters. Since Democrats were even more dependent on labor unions then than they are today, such a tactic normally would have been risky. In this case, though, the Kennedy brothers picked the right target. A United Auto Workers official told Thomas that the attack was "good politics," noting that the AFL-CIO was cleaning up corrupt unions anyway and had already expelled the Teamsters. Thus the Kennedys came across as crusaders not beholden to organized labor, yet remained acceptable to most union bosses.

Like many of RFK's ostensibly political causes, the attempt to tackle the Teamsters was personal. Both Kennedys developed a strong animosity toward Teamster leader Jimmy Hoffa, with RFK's attitude bordering on obsession. (Steel quotes an approving comment from Joseph Kennedy: "When Bobby hates you, you stay hated.") Acting on information from the Rackets Committee, the FBI filmed Hoffa taking bribes. Hoffa's trial, which RFK thought would end in a triumphant conviction, instead became an embarrassment. In a model for future cases, Hoffa attorney Edward Bennett Williams played the race card. After choosing a Washington jury that was two-thirds black, Williams kept a black associate at the defense table and even brought black boxing champ Joe Louis into court to greet Hoffa. The jury voted to acquit, which galled RFK, since he had been a prosecution witness. Eventually, he'd get his revenge, but he had to wait for it.

In his first 1960 debate with Richard Nixon, John Kennedy proclaimed, "I'm not satisfied when I see men like Jimmy Hoffa—in charge of the largest union in the United States—still free." Neither Steel nor Thomas mentions this extraordinary and disturbing line, in which a presidential candidate called for the imprisonment of a specific individual. This comment was an early hint that executive power and the Kennedy family would be a dangerous mix.

Another danger signal was the way RFK ran his brother's presidential campaign. Despite his later saintly reputation, he wasn't above the kind of dirty politics that helped bring Nixon down.



SCOTT STANTIS

Thomas briefly mentions allegations that Kennedy underling Paul Corbin secretly distributed anti-Catholic literature in the West Virginia primary, intending to pin the blame on JFK's primary opponent, Hubert Humphrey. According to a standard work on dirty campaign tactics, Bruce Felknor's *Political Mischief*, Corbin actually distributed the hate literature in Wisconsin, concentrating on Catholic districts where the recipients were sure to raise a fuss. Felknor adds that Corbin was acting under RFK's direction.

A more notorious RFK associate was Dick Tuck, who specialized in political sabotage. Thomas calls Tuck a "merry prankster." He forgets that when Donald Segretti pulled Tuck-like "pranks" for Richard Nixon's 1972 re-election campaign—distributing fake literature, disrupting rallies, planting rumors—he ended up in prison, and helped add to Nixon's reputation as a nightmarishly evil politician, a reputation RFK has avoided.

Though RFK had never practiced law, his brother followed their father's advice and named him attorney general. Within two weeks of taking the helm at the Justice Department, RFK declared a "war on crime." As usual when government declares a "war," constitutional safeguards were the first casualty. "Don't tell me what I can't do," Thomas quotes him as telling his staff. "Tell me what I can do."

The result was a massive invasion of civil liberties, in which federal agents broke into homes and businesses in order to plant bugs and wiretaps. RFK met with a Treasury Department official in charge of training agents in trespass and surveillance. When the official balked at his new boss' demand to triple the number of trainees, Kennedy suggested that he retire. Thomas reports that the official stepped down and that enrollment for training in the fine arts of violating citizens' rights mushroomed.

It didn't stop with gangsters. Thomas casually mentions that Mortimer Caplin, head of the Internal Revenue Service under JFK and LBJ, was a friend of RFK's who had taught him at the University of Virginia Law School. But Thomas doesn't discuss Caplin's "Ideological Organizations Audit Project," under which the IRS revoked the tax-exempt status of several right-wing groups. During this time, the IRS also audited Richard Nixon, while RFK's Justice Department investigated Nixon's mother and brother in connection with a personal loan from Howard Hughes. The inquiries produced no evidence of wrongdoing, but they did convince Nixon that the Kennedy family was harassing him. His resentment helped lay the foundation for Watergate.

During RFK's reign at Justice, J. Edgar Hoover continued to probe alleged communist "dupes," including Martin Luther King. Though RFK was nominally Hoover's boss, he did little to restrain him. Hoover knew all about President Kennedy's personal life, including the mistress he shared with a Mafia don who had taken part in CIA plots against Castro. As Bobby was painfully aware, Hoover could have destroyed the Kennedy administration by disclosing such information.

Robert Kennedy's domain reached beyond the Justice Department. His brother virtually made him an assistant president, involving him in foreign policy issues. As accurately portrayed in the movie *Thirteen Days*, RFK helped guide decision making in the Cuban Missile Crisis—though as Steel points out, he later took credit for a crucial maneuver that was actually the brainchild of National Security Adviser McGeorge Bundy.

RFK treated foreign policy as an extension of law enforcement. In support of Third World "counterinsurgency," he enlisted American police chiefs to train their counterparts in Latin America and Asia. In light of Kennedy's later sympathy with radicals, Thomas notes that it was "more than a little ironic" that he supplied their oppressors with technical help: "The 'academy,' where RFK would show up to deliver graduation addresses, was an old barn in Georgetown. Inside, men in dark glasses with pitted faces blasted away on the shooting range at large cardboard cutouts of men, each one stenciled Subversive."

RFK's world darkened on November 22, 1963—not only because his brother had died, but also because the presidency had passed to Lyndon Johnson, whom he despised. Immediately after the assassination, Bobby asked Bundy to change the locks on his brother's files, so that Johnson could not get at them. In the months to follow, writes Thomas, he "could not understand how readily some of JFK's former aides transferred their allegiance to his successor." Steel touches on the same point, adding sensibly: "The fact that this is the way public officials are supposed to behave in a democracy eluded him. Only in a dictatorship does the staff flee when a ruler dies."

By the summer of 1964, RFK had recovered enough to seek a U.S. Senate seat from New York. Having always voted in Massachusetts, he had no real connection to the state, but the LBJ landslide was

enough to carry him to victory over the GOP incumbent. (This result set a precedent for carpetbagging: Subsequent occupants of this seat included James Buckley of Connecticut and Hillary Rodham Clinton of Illinois and Arkansas.)

In the Senate, Kennedy styled himself as a spokesman for the downtrodden. He sponsored legislation setting up a community development corporation in New York's Bedford-Stuyvesant ghetto. Steel and Thomas praise him for this initiative to create jobs, but both acknowledge that its effects were modest at best. And neither writer mentions that much of the credit belonged to his senior colleague in the Senate, Republican Jacob Javits.

RFK's efforts at establishing himself as a liberal icon were largely symbolic and occasionally ridiculous. Thomas, for instance, relates a moment when Kennedy told a group of Native Americans: "I wish I had been born an Indian." Thomas says that this statement was not mawkish pandering but a genuine expression of empathy. If you are inclined to believe such nonsense, you can cure yourself by digging out the old *National Lampoon* album with the song "Well-Intentioned Blues." Parodying Pete Seeger songs, Sean Kelly's lyrics expressed the longings of 1960s coffeehouse liberals: "I wish I was an Indian/A grown-up Sioux papoose/So when I get drunk on a beer and a half/I'd have a good excuse."

Steel suggests a straightforward explanation for RFK's courtship of the underprivileged: He wanted to be president, and he had to appeal to outsiders because LBJ owned the insiders. As the 1968 election approached, Bobby wasn't sure this approach was working, so he declined to run. Only when anti-war candidate Eugene McCarthy made a surprisingly strong showing in the New Hampshire primary did he change his mind and enter the race.

RFK's presidential campaign, which ended with his murder in Los Angeles on the night of the California primary, spawned a couple of myths. The first is that he built a coalition of minorities and blue-collar whites that would have carried him to victory in the fall. Using data from the 1968 primaries, both Thomas and Steel show that contemporary news accounts greatly exaggerated RFK's appeal outside minority communities; the Archie Bunker–George Jefferson coalition, however appealing, was not to be. And though neither author makes a point of it, RFK would probably have lost to Nixon. In the last trial heat poll before RFK's assassination, Gallup found that while Hubert Humphrey was only three points behind Nixon, Kennedy trailed by 10.

Another myth, popular among Republicans and members of the Democratic Leadership Council, is that Kennedy was an early model neoconservative or Third Way Democrat. Indeed, a quick glance at certain Kennedy statements might leave such an impression. He called for a "new politics" that would "halt and reverse the growing accumulation of power and authority in the central government in Washington, and return that power of decision to the American people in their own local communities." In a campaign press release, he said: "The answer to the welfare crisis is work, jobs, self-sufficiency, and family integrity; not a massive new extension of welfare; not a great new outpouring of guidance counselors to give the poor more advice."

It's doubtful that Bobby really meant any of that. As both authors explain, polls in the late 1960s showed widespread support for such sentiments, so even the most pro-government politicians were talking that way. On specifics, RFK was an orthodox liberal. During his short Senate career, his average voting score from the Americans for Democratic Action was 92 percent. When he spoke of welfare reform, he didn't mean leaving businesses alone to create new jobs. Rather, he proposed sweeping new federal programs for employment, housing, and medical care.

It is odd that so many people think wistfully of what he would have done if he had lived. Most of the policies that he supported did become law during the 1960s and 1970s—and they became the very failures that the New Democrats later promised to reform. It is also striking that his memory evokes feelings of personal warmth among people who never knew him. He is remembered as a devoted family man despite widespread rumors of his extramarital activities (including a possible affair with Marilyn Monroe). He is recalled as a high-minded idealist, but he was also a ruthless political operator who could be callous to subordinates and cruel to enemies. "Now he was great with the problems of a group, like Indians, colored people, or people that were being religiously oppressed or the poor," Thomas quotes one associate. "But as far as a one-to-one basis, that wasn't his cup of tea at all."

Politicians of all stripes continue to invoke his name, hoping to "get right with Bobby" by associating themselves with his legend. A careful reading of these books can help us appreciate the difference between that legend and the man who inspired it. Death has a way of spawning such legends. With the real person lying securely underground, living politicians are free to inflate his reputation and hang on as it soars through the sky. Shakespeare got it wrong. The evil men do is oft interred with their bones, while good imagery lives after them.

Contributing Editor John J. Pitney Jr. (jpitney@mckenna.edu) is associate professor of government at Claremont McKenna College.

A Notice To Our Subscribers

From time to time, our subscriber list is rented to others. We carefully screen those to whom we rent our list and try only to rent to those whose offers we believe may interest our subscribers. If you do not wish to have your name included on our rental list, simply let us know by writing us at:

REASON
3415 S. Sepulveda Blvd., Suite 400
Los Angeles, CA 90034
Attn: List rentals

Libertarian Futurist Society

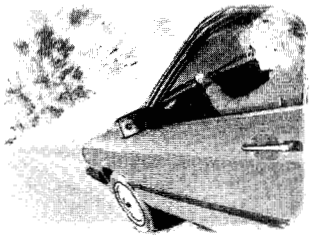
Join the LFS and vote for the Prometheus Awards for pro-freedom science fiction

"One of the best deals around. How else would I learn of the new SF books that I'd be most likely to want to read?" -- Robert Poole, Reason Foundation

89 Gebhardt Rd, Penfield, NY 14526
www.lfs.org

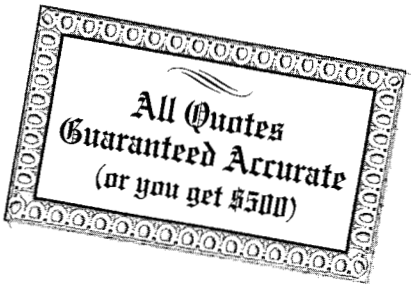
How to make intelligent, safe and cost-conscious decisions every time you buy insurance. At Quotesmith.com you get instant quotes from over 300 companies – and the freedom to buy from the company of your choice. It's fast and easy.

Instant Car Insurance Quotes



Could you save 20% or more on car insurance? We've made it quick and easy to get instant car insurance quotes from leading insurers, all in one place.
Quotesmith.com is an ideal car insurance resource for drivers of every age.
At Quotesmith.com, we've even made it possible for you to point, click and buy online!

All in one place: instant quotes from leading companies make it easy to comparison shop.



Popular with families: 10, 20 and 30 year term life insurance can give peace of mind.

Instant Term Life Insurance Quotes

Pick a rate guarantee and go! In seconds, you'll view policies, coverages, independent ratings, underwriting guidelines and premiums – all conveniently sorted by lowest cost.

Quotesmith.com makes it easy to compare health plans, features and prices.

Quotesmith.com Online!
File Edit InstantQuote Help

Quotesmith.com incorporated

"We found the best deals at Quotesmith."
Money Magazine

"SmartMoney Interactive has rated Quotesmith the #1 site for online insurance quotes."
SmartMoney Online

"...make shopping for the cheapest insurance policy much easier."
Parents Magazine

"...the largest number of insurers..."
Jane Bryant Quinn

Wow! Instant quotes from over 300 leading insurance companies right here and now

Fast Accurate Easy Unbiased Private

Instant Car Insurance Quotes

Instant Term Life Quotes
View America's lowest premiums - or you get $500!

Quick-Issue Life Insurance Quotes
- No medical exams, speedy issue

Instant Medicare Supplement Quotes
Quick quotes for ages 65 & up

Instant Medical Insurance Quotes
- For individuals & families
- One employee or one family
- Groups of 2-100 employees

Instant Workers' Compensation Quotes
For Small Businesses

Instant Dental Insurance Quotes
Small Business/Families/Individuals

Instant Boat, Watercraft, RV & Motorcycle Insurance Quotes

BBB RELIABILITY PROGRAM BBBONLINE

More instant insurance quotes than any place else on earth! Get instant quotes, view the latest ratings, examine vital policy coverages, view underwriting guidelines, buy from the company of your choice. Take control of your insurance decisions. Have questions? Want help? Call us toll-free at 1-800-556-9393, 7 a.m. to 10 p.m. Central time. California and Utah DBA Quotesmith.com Insurance Services. CA #0827712, #OA13858, UT #90093. Some companies are shown for purely informational purposes only. $500 guarantee is subject to the terms and conditions detailed at www.quotesmith.com.

Instant Medical Insurance Quotes

Here is the quickest way possible to find health insurance coverage for yourself, your family or your small business.
Get instant quotes, scan the marketplace in seconds. You'll find standard plans, PPOs, HMOs, short term plans, dental plans and Medicare supplement plans all in one place at Quotesmith.com.
Participation by leading companies eliminates the hassle of buying medical insurance.

www.quotesmith.com

AD CODE:
REAS 04/01

Shear Anxiety

Haircut cops in Kabul rounded up a few dozen of the city's barbers in January, charging them with turning men into Leonardo DiCaprio wannabes. That's a serious matter in Afghanistan, because its extremist religious rulers, the Taliban, regard most foreign haircuts as "anti-Islamic." The supposed problem with the DiCaprio cut, which copies the actor's look in *Titanic* (and which is known locally as a "Titanic"), is that it lets hair fall over the forehead and thus interferes with prayer.

Of course, there's another problem. Participating in clothing and hair fads is an act of self-fashioning, and has been anathema to totalist regimes whenever it has arisen. In fact, while the 20th century's despots had little trouble controlling elite taste, they were all flummoxed by popular culture. The appeal of consumer goods and commercial culture may embarrass Western critics, but from Eastern Europe to Russia to China, it has proved irrepressible. The path to political freedom is strewn with such market "vulgarities," because the release from repression is first a release from the prison of self.

Political "Islamists" (whose coerciveness misrepresents the faith) are coping with this no better than did their totalist predecessors. Iran's mullahs, for example, have been forced to relent on the cultural front, allowing citizens to own pop recordings and, increasingly, relaxing enforcement of the stringent public dress code. Just so, the Taliban, surveying Kabul's streets for would-be DiCaprios, are spying the tip of the iceberg that will eventually sink them.

—Charles Paul Freund

Dumbing Down the Public: Why It Matters

Diane Ravitch is a research professor, New York University; distinguished visiting fellow, Hoover Institution; and member, oover's Koret Task Force on K–12 Education.

On several occasions, I have found myself in a familiar dialogue. When I complain about low expectations in the schools, my opposite number says, "So what? Our economy is doing well, we win the lion's share of Nobel Prizes, and we have enough qualified people to fill our most demanding professions." In other words, even if a third of our youngsters are not learning the most elementary skills in school, even if a third of our college freshmen must get remediation on campus, there's no cause for concern.

Behind this disagreement are two different assumptions: I assume that our education system should aim to educate everyone who comes to school; the other side says that ability is distributed along a bell-shaped curve and that we should not be overly concerned about the laggards because we will always need people to pick up the trash and sweep the streets. I confess that I get confused at this point because the current argument favoring low or no standards is coming from people who claim to be on the left.

Some evidence recently surfaced, which suggests that **a democratic society pays a price for widespread ignorance.** The *Princeton Review,* best known for its test preparation services, analyzed the vocabulary used by the presidential candidates in the campaign debates of 2000 and compared it to the vocabulary levels used in earlier campaign debates.

The *Princeton Review* obtained transcripts of the Gore-Bush debates, the Clinton-Bush-Perot debate of 1992, the Kennedy-Nixon debate of 1960, and the Lincoln-Douglas debate of 1858. It analyzed these transcripts using a standard vocabulary test that indicates the minimum educational level needed for a reader to understand a document. This test is ordinarily used to evaluate textbooks and other educational materials.

The results? In the debates of 2000, George W. Bush spoke at a sixth-grade level (6.7); Al Gore spoke at a high seventh-grade level (7.9). In 1992, challenger Bill Clinton scored in the seventh grade (7.6), President George Bush in the sixth grade (6.8), and Ross Perot at a sixth-grade level (6.3).

Our contemporary politicians, who found it necessary to speak to us as sixth and seventh graders, compared unfavorably with Kennedy and Nixon, both of whom spoke in a vocabulary appropriate for tenth graders. And they, in turn, looked sophomoric when compared to Abraham Lincoln and Stephen Douglas, whose scores, respectively, were 11.2 and 12.0.

Is it the candidates who have dumbed down their appeals or are they simply acknowledging that the public has a limited vocabulary? Candidates for public office, it is clear, must tailor their arguments to what the public can understand. Even though most Americans have completed at least twelve years of education, our candidates for president know that they cannot use big or unusual words when they address the voting public. This is what happens in a society that tolerates low expectations in our schools.

— *Diane Ravitch*

Paid for by the Hoover Institution, Stanford University.

Interested in more commentary on public policy?

Visit us on-line at www.hoover.org or contact us to receive a complimentary copy of the 200-page, award-winning Hoover Digest.

Hoover Institution...*ideas defining a free society*

STANFORD UNIVERSITY, Stanford California 94305-6010
Toll-free: 877.466.8374 Fax: 650.723.1687
info@hoover.stanford.edu www.hoover.org

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED